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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1942**

**No. 590**

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**HARRIS KENNEDY, ET AL., PETITIONERS,**

**vs.**

**SILAS MASON COMPANY**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED FEBRUARY 12, 1943.**

**CERTIORARI GRANTED MARCH 2, 1943.**



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**UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION.**

**No. 1594 Civil**

**HARRIS KENNEDY, ET AL**

**versus**

**\*SILAS MASON COMPANY..**

**TRANSCRIPT OF APPEAL Taken by Complainants to the United States Circuit Court of Appeals, Fifth Circuit, New Orleans, Louisiana.**

**Appearances:**

**Turner B. Morgan, Esquire,  
Messrs. Booth, Leckard & Jack,  
Attorneys for plaintiffs-Appellants.  
Messrs. Cook, Clark & Egan,  
Attorneys for defendant-Appellee.**

**COMPLAINT.**

**(Title Omitted.)**

**To the Honorable Judges of the United States District Court of America in and for the Western District of Louisiana, Shreveport Division:**

**The complaint of Harris Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, James E. Fitch and**

Harry Johnson, all residents of the Parish of Caddo, State of Louisiana, with respect, represents:

1.

That the Silas Mason Company is a foreign corporation authorized to do and doing business in the State of Louisiana.

2.

That the Silas Mason Company during the past several years has been engaged in commerce and in the production of goods for interstate commerce as those terms are defined by the Fair Labor Standard Act, being an Act of Congress, June 25, 1938, c. 676, 52 Statute 1060, 29 U. S. C. A. 203, in that the Silas Mason Company, during said period of time, has been engaged in the operation of a shell loading plant known as the Louisiana Ordnance Plant, which plant is located between Minden and Shreveport, Louisiana, on Highway No. 80 within Webster Parish, Louisiana, and within the Western District of the State of Louisiana, and which plant has produced, manufactured, fabricated and loaded shells, ammunition, bombs and other products and materials, all of which went into interstate commerce.

3.

That during its entire operations in the State of Louisiana as aforesaid, the said Silas Mason Company has been subject to the Fair Labor Standards Act and Walsh-Healey Public Contract Act (41 U. S. C., Sections 35-45) in that the Silas Mason Company, during its entire operations in Louisiana, has been operating under a contract with the War Department of the United States in

volving in excess of \$10,000.00 for the manufacture and furnishing of materials, supplies and equipment to the War Department.

4.

That all of the work performed by the complainants for the defendant and hereinafter detailed was performed by the complainants directly in connection with commerce and the production of goods for interstate commerce and in direct connection with the defendant's contract with the War Department of the United States and that complainants were at all times during their employment by the defendant as hereinafter detailed covered by the provisions of the Fair Labor Standards Act and by the Walsh-Healy Public Contracts Act.

5.

That Harris Kennedy was employed by the defendant as a safety inspector from December 2nd, 1944, through June 16th, 1945, but that he was required to work in excess of 40 hours per week and did work the number of hours in excess of 40 per week as shown on Schedule "A" attached hereto and made a part hereof, being compensated only for 40 hours work per week at \$1.25 per hour, the established rate for his classification.

6.

That Howard S. Sweatt was employed by the defendant as a safety inspector from December 9th, 1944, through June 30th, 1945, but that he was required to work in excess of 40 hours per week and did work in excess of 40 hours per week as shown on Schedule "B" attached hereto and made a part hereof, being compen-



4

sated only for 40 hours per week at \$1.25, the established rate for his classification.

7.

That L. M. Williams was employed by the defendant as a Chief Shift Inspector, Process, from August 13th, 1944, through April 12, 1945, but that he was required to work in excess of 40 hours per week and did work the number of hours in excess of 40 hours per week as shown on Schedule "C" attached hereto and made a part hereof, being compensated only for 40 hours per week at \$1.50 per hour up until November 11, 1944, and only for 40 hours per week at \$1.62½ per hour after November 11, 1944, the established rates for his classifications.

8.

That William S. Jones was employed by the defendant as a foreman, Classification B-2, from July 29th, 1944, through June 23rd, 1945, but was required to work in excess of 40 hours per week and did work in excess of 40 hours per week the number of hours shown on Schedule "D" attached hereto and made a part hereof, being compensated only for 40 hours per week at \$1.75 per hour up until December 9th, 1944, and at \$1.87½ per hour after December 9th, 1944, the established rates for his classifications.

9.

That Harry Johnson was employed by the defendant as a foreman from August 12th, 1944, through July 14th, 1945, but was required to work in excess of 40 hours per week and did work the number of hours in excess of

40 per week as shown on Schedules "E" and "F" attached hereto and made a part hereof, being compensated only for 40 hours work per week at \$1.62½ per hour, the established rate for his classification.

10.

That James E. Fitch was employed by the defendant as a safety inspector from December 2, 1944, through June 23rd, 1945, but was required to work in excess of 40 hours per week and did work in excess of 40 hours per week the number of hours shown on Schedule "F" attached hereto and made a part hereof, being compensated only for 40 hours work per week at \$1.25 per hour, the established rate for his classification.

11.

That under the Fair Labor Standards Act, the Walsh-Healy Act, the rules and regulations of the Department of Labor, of the Administrator of the Fair Labor Standards Act and under the wage classifications and wage scales duly promulgated for the defendant Company, your complainants should have been compensated for all hours in excess of 40 per week at time and one-half and double time for all work performed on Sundays and holidays.

12.

That the defendant company consistently followed the practice, not only with your complainants but with all its other employees in similar positions, of docking or deducting from their pay for all time less than 40 hours per week, even for as much as 15 minutes, the deductions being figured on an hourly basis and your com-

plainants were required to punch a clock in order that their time could be ascertained.

13.

That none of your complainants come within any of the Exemptions provided for by law or by rules and regulations promulgated by those charged by law to promulgate such rules and regulations and on the other hand, your complainants show that they have not been paid in accordance with law.

14.

Your complainants show that a direct cause of action against the defendant is granted them by law and that jurisdiction is conferred upon this Honorable Court by the several Acts of Congress.

15.

Your complainants show that by virtue of the defendant's refusal and failure to pay your complainants any compensation for over time worked in excess of 40 hours per week, the defendant is indebted unto your complainants double the amount due them as a penalty and that the defendant is therefore indebted unto complainants in the amounts shown on Schedules "A", "B", "C", "D", "E", "F", and "G" attached hereto and made a part hereof.

16.

Your complainants further show that the defendant is indebted unto them for a reasonable attorney's fee as is provided for by law and that in this connection,



your complainants show that they have been forced to hire an attorney to handle this case for them and that they should be awarded in addition to the other sums herein prayed for an additional sum of Twenty-five Hundred Dollars as a reasonable attorney's fee.

## 17.

Complainants allege amicable demand without avail.

Wherefore, your complainants pray that the defendant be served with a copy of this complaint and cited to appear and answer same within the delays granted by law and that after a hearing duly had that there be judgment herein in favor of your Complainants and against the Silas Mason Company as follows:

In favor of:

Harris Kennedy, the sum of Six Hundred Ninety-Nine and 87/100 (\$699.87) Dollars with legal interest thereon from judicial demand until paid.

Howard S. Sweatt, the sum of Six Hundred Twenty-Six and 25/100 (\$626.25) Dollars with legal interest thereon from judicial demand until paid.

L. M. Williams, the sum of One Thousand Two Hundred Thirty-Six and 87/100 (\$1,236.87) Dollars with legal interest thereon from judicial demand until paid.

William S. Jones, the sum of Two Thousand One Hundred Seventy-Six and 50/100 (\$2,176.50) Dollars with legal interest thereon from judicial demand until paid.

Harry Johnson, the sum of One Thousand Two Hundred Sixty-five and no/100 (\$1,265.00) Dollars with legal interest thereon from judicial demand until paid.

James E. Fitch, the sum of Three Hundred Ninety and no/100 (\$390.00) Dollars with legal interest thereon from judicial demand until paid.

Your complainants further pray for all costs and further judgment in their favor and against the defendant in the sum of Two Thousand Five Hundred (\$2,500.00) Dollars as a reasonable attorney's fee.

For all general and equitable relief.

(Sgd.) TURNER B. MORGAN,

(Turner B. Morgan)

Attorney for Complainants.

(Affidavit omitted.)

### SCHEDULE "A".

Harris Kennedy—#830—Safety Inspector.

Week Ending Date	Rate Per Wk. \$50.00	1½ @ \$50.00	Double @ \$50.00	Total Hrs. Worked
12- 9-44	40	8		48
12-16-44	40	8		48
1- 6-45	40	8		48
1-13-45	40	8		48
1-20-45	40	8		48
1-27-45	40	8		48
2-17-45	40	8		48
3- 3-45	40	8		48
3-10-45	40	8		48
3-17-45	40	8	7	55

Week Ending Date	Rate Per Wk. \$50.00	1½ @ \$50.00	Double @ \$50.00	Total Hrs. Worked
3-24-45	40	8	..	48
3-31-45	40	8	8	56
4- 7-45	40	8	..	48
4-14-45	40	8	..	48
4-28-45	40	8	8	56
5- 5-45	40	8	..	48
5-12-45	40	8	..	48
5-19-45	40	4½	..	44½
5-26-45	40	8	..	48
6-16-45	40	8	..	48
	800	156½	23	979½

Rate \$50.00 @ 1½ 156½ hrs. @ 1.875 ..... = \$292.43¾

Rate \$50.00 @ Double—23 hrs. @ 2.50 ..... = 57.50

\$349.93¾

Penalty ..... 349.93¾

\$699.87½

### SCHEDULE "B".

Howard S. Sweatt—#841—Safety Inspector.

Week Ending Date	Rate Per Wk. \$50.00	1½ @ \$50.00	Double @ \$50.00	Total Hrs. Worked
12-16-44	40	4½	..	41½
12-23-44	40	8	..	48
1- 6-45	40	8	..	48
1-13-45	40	8	..	48
1-27-45	40	8	..	48
2- 3-45	40	8	..	48
2-10-45	40	8	..	48
2-17-45	40	7½	..	47½



Week Ending Date	Rate Per Wk. \$50.00	1½ ● \$50.00	Double ● \$50.00	Total Hrs. Worked
2-24-45	40	8	..	48
3- 3-45	40	8	..	48
3-10-45	40	7½	..	47½
3-17-45	40	7½	..	47½
3-31-45	40	8	..	48
4- 7-45	40	8	..	48
4-14-45	40	8	..	48
4-21-45	40	8	..	48
5- 5-45	40	8	..	48
5-12-45	40	8	..	48
5-19-45	40	8	..	48
5-26-45	40	8	..	48
6- 2-45	40	8	..	48
6-30-45	40	4	..	44

880

167

1047

Rate \$50.00 @ 1½ 167 hrs. @ 1.875 ..... = \$313.12½

Penalty ..... 313.12½

\$626.25**SCHEDULE "C".****L. M. Williams—#491—Chief Shift Inspector-Process.**

Week Ending Date	Rate per Wk. \$50.00—\$55.00	1½ ● \$50.00—\$55.00	Double ● \$50.00—\$55.00	Total Hrs. Worked
8-19-44	40 ..	8 ..	.. ..	48
8-26-44	40 ..	8 ..	.. ..	48
9- 9-44	40 ..	8 ..	.. ..	48
9-16-44	40 ..	8 ..	.. ..	48
9-23-44	40 ..	8 ..	7½ ..	55½
9-30-44	40 ..	7½ ..	.. ..	47½
10- 7-44	40 ..	8 ..	.. ..	48
10-14-44	40 ..	8 ..	.. ..	48

Week Ending Date	Rate per Wk. \$60.00—\$65.00		1½ @ \$60.00—\$65.00		Double @ \$60.00—\$65.00		Total Hrs. Worked
10-21-44	40	..	8	..	..	..	48
10-28-44	40	..	8	..	8	..	56
11- 4-44	40	...	8	..	8	..	56
11-18-44	..	40	..	8	..	8	56
11-25-44	..	40	..	8	..	..	48
12- 2-44	..	40	..	7½	..	..	47½
12- 9-44	..	40	..	7	..	..	47
12-16-44	..	40	..	8	..	..	48
12-23-44	..	40	..	7½	..	..	47½
1- 6-45	..	40	..	8	..	..	48
1-20-45	..	40	..	8	..	..	48
1-27-45	..	40	..	4	..	..	44
2- 3-45	..	40	..	8	..	..	48
2-17-45	..	40	..	2	..	..	42
2-24-45	..	40	..	8	..	..	48
3- 3-45	..	40	..	8	..	8	56
3-10-45	..	40	..	8	..	..	48
3-17-45	..	40	..	8	..	..	48
3-24-45	..	40	..	8	..	..	48
4-12-45	..	40	..	3	..	..	43

440 680 87½ 119 23½ 16 1366

Rate \$60.00 @ 1½ 87½ hrs. @ 2.25..... = \$196.87½

Rate \$60.00 @ Double 23½ hrs. @ 3.00..... = 79.50

Rate \$65.00 @ 1½ 119 hrs. @ 2.43¾..... = 290.06¼

Rate \$65.00 @ Double 16 hrs. @ 3.25..... = 52.00

\$618.43¾

Penalty ..... 618.43¾

1,236.87½

Filed Aug. 23, 1945.

## SCHEDULE "D".

William S. Jones—#232—Classification B-2.

Week Ending Date	Rate per Wk.		1½		Double		Total Hrs. Worked
	\$75.00—\$80.00	\$80.00—\$85.00	\$75.00—\$80.00	\$80.00—\$85.00	\$75.00—\$80.00	\$80.00—\$85.00	
8- 5-44	40	..	8	..	4	..	52
8-12-44	40	..	8	..	4	..	52
9- 2-44	40	..	8	..	8	..	56
9-16-44	40	..	8	..	..	..	48
9-23-44	40	..	8	..	..	..	48
9-30-44	40	..	8	..	4	..	52
10- 7-44	40	..	8	..	..	..	48
10-14-44	40	..	8	..	..	..	48
10-21-44	40	..	8	..	..	..	48
10-28-44	40	..	8	..	4	..	52
11- 4-44	40	..	8	..	4	..	52
11-11-44	40	..	4	..	..	..	44
11-18-44	40	..	8	..	4	..	52
11-25-44	40	..	8	..	..	..	48
12- 9-44	40	..	8	..	..	..	48
12-16-44	..	40	..	8	..	..	48
12-23-44	..	40	..	8	..	..	48
1- 6-45	..	40	..	8	..	..	48
1-13-45	..	40	..	8	..	..	48
1-20-45	..	40	..	8	..	..	48
1-27-45	..	40	..	8	..	..	48
2- 3-45	..	40	..	8	..	3	51
2-10-45	..	40	..	8	..	..	48
2-17-45	..	40	..	8	..	..	48
2-24-45	..	40	..	8	..	4	52
3- 3-45	..	40	..	8	..	..	48
3-10-45	..	40	..	7	..	..	47
3-17-45	..	40	..	8	..	4	52
3-24-45	..	40	..	8	..	4	52
3-31-45	..	40	..	4	..	..	44

Week Ending Date	Rate per Wk. \$75.00—\$80.00	1½ @ \$75.00—\$80.00	Double @ \$75.00—\$80.00	Total Hrs. Worked
4-14-45	40	8	..	48
4-21-45	40	7	..	47
4-28-45	40	8	..	48
5- 5-45	40	8	..	48
5-12-45	40	8	..	48
5-19-45	40	8	..	48
5-26-45	40	8	..	48
6- 2-45	40	8	..	48
6- 9-45	40	8	..	48
6-23-45	40	8	..	48

600 1000 116 194 32 15- 1957

Rate \$75.00 @ 1½ 116 Hrs. @ 2.81¼..... = \$326.25  
 Rate \$75.00 @ Double 32 Hrs. @ 3.75..... = 120.00  
 Rate \$80.00 @ 1½ 194 Hrs. @ 3.00..... = 582.00  
 Rate \$80.00 @ Double 15 Hrs. @ 4.00..... = 60.00

\$1,088.25

Penalty ..... 1,088.25

\$2,176.50

Filed Aug. 23, 1945.

### SCHEDULE "E".

Harry Johnson—#371—"1944."

Week Ending Date	Rate Per Wk. \$65.00.	1½ @ \$65.00	Double @ \$65.00	Total Hrs. Worked
8-19-44	40	7	..	47
8-26-44	40	7	..	47
9- 2-44	40	8	..	48
9- 9-44	40	2	..	42
9-16-44	40	7	..	47



Week Ending Date	Rate Per Wk. \$65.00.	1½ ● \$65.00	Double ● \$65.00	Total Hrs. Worked
9-23-44	40	7	..	47
9-30-44	40	8	..	48
10- 7-44	40	4½	..	44½
10-14-44	40	7	..	47
10-21-44	40	4	..	44
10-28-44	40	8	..	48
11- 4-44	40	8	..	48
11-11-44	40	7	..	47
11-18-44	40	6	..	46
11-25-44	40	8	..	48
12- 2-44	40	8	..	48
12- 9-44	40	8	..	48
12-16-44	40	8	..	48
12-23-44	40	3½	..	43½
<hr/>				
	760	126	..	886

Rate \$65.00 @ 1½ 126 Hrs. @ 2.4375 ..... = \$307.125

Penalty ..... = 307.125

\$614.25

Filed Aug. 23, 1945.

### SCHEDULE "F".

Harry Johnson—#371—"1945"

Week Ending Date	Rate Per Wk. \$65.00.	1½ ● \$65.00	Double ● \$65.00	Total Hrs. Worked
1- 6-45	40	8	..	48
1-13-45	40	3½	..	43½
1-20-45	40	8	..	48
1-27-45	40	1½	..	41½
2- 3-45	40	1½	..	41½
2-10-45	40	8	..	48

154

Week Ending Date	Rate Per Wk. \$65.00	1 1/2 @ \$65.00	Double @ \$65.00	Total Hrs. Worked
2-17-45	40	8	..	48
2-24-45	40	8	..	48
3- 3-45	40	8	..	48
3-10-45	40	8	..	48
3-17-45	40	3 1/2	..	43 1/2
3-31-45	40	8	..	48
4- 7-45	40	8	..	48
4-21-45	40	8	..	48
4-28-45	40	8	..	48
5-12-45	40	8	..	48
5-19-45	40	8	..	48
6- 2-45	40	8	..	48
6- 9-45	40	8	..	48
6-16-45	40	8	..	48
6-30-45	40	8	..	48
7-14-45	40	8	..	48
880		154	..	1034

Rate \$65.00 @ 1 1/2 154 hrs. @ \$2.4375..... = \$375.375  
 Penalty ..... 375.375  
\$750.75

Year 1944 ..... \$307.125  
 Year 1945 ..... 375.375

682.50  
 682.50

\$1,265.00

Filed Aug. 23, 1945.

# SCHEDULE "G"

James E. Fitch—#826—Safety Inspector.

Week Ending Date	Rate Per Wk. \$50.00	1½ @ \$50.00	Double @ \$50.00	Total Hrs. Worked
12- 9-44	40	8	..	48
12-16-44	40	8	..	48
1-13-45	40	8	..	48
1-20-45	40	8	..	48
1-27-45	40	8	..	48
2-10-45	40	8	..	48
2-24-45	40	8	..	48
3- 3-45	40	8	..	48
3-17-45	40	8	..	48
3-24-45	40	8	..	48
4-21-45	40	8	..	48
6-16-45	40	8	..	48
6-23-45	40	8	..	48

520

104

624

Rate \$50.00 @ 1½ 104 Hrs. @ \$1.875 ..... = \$195.00

Penalty ..... 195.00

\$390.00

Filed Aug. 23, 1945.

14

## PLEA OF PRESCRIPTION.

(Titles Omitted.)

Silas Mason Company, defendant herein, shows:

1.

That this suit was filed August 23, 1945, and defendant, therefore, pleads the prescription of one year against

all claims asserted by complainants based on work performed prior to August 23, 1944.

Wherefore, defendant prays that its plea of prescription be sustained and complainants' demands be rejected as to all claims based on work performed prior to August 23, 1944.

Defendant further prays for all orders necessary, and for general and equitable relief.

COOK, CLARK & EGAN,  
By C. D. EGAN,  
Attorneys for Defendant.

(Certificate omitted.)

Filed May 17, 1945.

# MOTION FOR A MORE DEFINITE STATEMENT OF FACTS AND A BILL OF PARTICULARS.

15

(Titles Omitted.)

Defendant moves the Court for an order directing complainants to file a more definite statement of facts and a bill of particulars in the following matters:

1.

In Article 11 complainants allege that under the rules and regulations of the Department of Labor, of the Administrator of the Fair Labor Standards Act and under



the wage classifications and wage scales duly promulgated for the defendants company, they are entitled to compensation for hours in excess of 40 per week at time and one-half and to double time for work performed on Sundays and Holidays.

2.

That complainants should be ordered to amend and specify the rules and regulations, wage classifications and wage scales to which they refer in Article II of their complaint.

The ground for this motion is that the above matters are not averred with sufficient definiteness or particularity to enable defendant to properly prepare its answer, in that the defendant is unfamiliar with the existence of any rules, regulations, wage classifications, or wage scales of the type referred to in Article 11 of the complaint and is entitled to know upon what rules, regulations, wage classifications and wage scales complainants rely.

Wherefore, defendant prays that this motion for a more definite statement of facts and a bill of particulars be sustained and complainants ordered to amend their complaint in the respects hereinabove set forth.

Defendant further prays for all orders necessary, and for general and equitable relief in the premises.

COOK, CLARK & EGAN,

By C. D. EGAN,

Attorneys for Defendant.

1500 Commercial Bank Building,  
Shreveport, Louisiana.

Filed May 17, 1946.

## 17. MOTION FOR SUMMARY JUDGMENT.

(Titles Omitted.)

Defendant moves the Court as follows:

1.

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor dismissing the action, for the reason and on the ground that defendant is entitled to a judgment as a matter of law.

2.

That this motion is based upon the affidavit of R. L. Telford, Vice-President of defendant, which is hereto attached and herein incorporated, in support of this motion, and which states facts showing that as a matter of law neither complainants nor defendant were covered by the Fair Labor Standards Act, and that complainants are not entitled to recover all or any part of the amount sued for, under that or any other Act of Congress, in that during the period of complainants' asserted claims neither complainants nor defendant were engaged in commerce, or in the production of goods for commerce.

3.

That this motion is based upon the further proposition that the Walsh-Healey Act is inapplicable to complainants, that the Walsh-Healey Act confers upon complainants no cause or right of action against defendants; and that this Court is without jurisdiction over claims under the Walsh-Healey Act.

Wherefore, defendant prays that this motion be sustained, and that there be summary judgment in favor of defendant, and against complainants dismissing the suit of complainants at their costs.

Defendant further prays for all orders necessary, and for general and equitable relief.

COOK, CLARK & EGAN,

By C. D. EGAN,  
Attorneys for defendant.

Filed June 10, 1946.

State of Louisiana,  
Parish of Caddo.

Before Me, the undersigned authority, came and appeared R. L. Telford, who, being duly sworn, deposed and said:

That he has personal knowledge of all the facts recited in this affidavit.

That Silas Mason Company constructed and later operated the Louisiana Ordnance Plant under the terms of a contract with the United States of America, a copy of which is filed in the proceeding hereinafter mentioned.

That construction of the Plant under the terms of the said contract began on or about the 7th day of July, 1941, and that operation of the Plant began on or about the 4th day of March, 1942.

That deponent has been connected with the Silas Mason Company in an official capacity from a time long prior to the execution of the contract, above referred to, to the present time; that he was General Manager of

the work performed by the Company under the said contract from the beginning of the construction to the 9th day of June, 1943; and was both General Manager as above stated, and Vice-President of the Silas Mason Company thereafter until a time subsequent to August 23, 1945, the date of the filing of Civil Action No. 1594 on the docket of the United States District Court for the Western District of Louisiana, Shreveport Division, entitled "Harris Kennedy, et al., vs. Silas Mason Company".

That at all times involved in the complaint of complainants in the proceeding just above mentioned, the premises upon which complainants were employed, the tools and equipment which they were using in their employment, and the property and products with which they dealt in such employment, were all the property of, and belonged to, the United States Government; that the component parts of the shells, grenades, mines, fuses, bombs, and other products with which all of the complainants dealt were shipped to the Louisiana Ordnance Plant as property of the Government and the finished product, as property of the Government, was, by its direction, shipped out of the said premises for use by its Armed Forces in its War effort in the War with Germany, Japan, Italy, and other Nations; that at all times involved in the proceeding above mentioned, Silas Mason Company was operating the Louisiana Ordnance Plant, Shreveport, Louisiana, under the contract above mentioned, which is a cost-plus-a-fixed-fee contract with the United States Government, and under which contract the United States Government obligated itself to pay the Silas Mason Company a fixed fee for operating the said Plant, plus all expenses in connection with the operation thereof.



That there were no rules, regulations, wage scales, or wage classifications promulgated for Silas Mason Company requiring that complainants in the above numbered proceeding be compensated for all hours in excess of 40 at time and one-half and at double time for all work performed on Sundays and Holidays; and there was no custom of Silas Mason Company involving or requiring such compensation to complainants, or persons similarly situated.

R. L. TELFORD.

Sworn to and subscribed before me, on this the 10th day of June, 1946.

C. D. EGAN,  
Notary Public.

Filed June 10, 1946.

21

CONTRACT No. W-ORD-517.

DA-W-ORD-4.

Cost-Plus-A-Fixed-Fee  
New Ordnance Facility  
Construction and Operation Contract.

War Department.

Contractor: Silas Mason Company, New York, N. Y.

Contract for: Architect-engineer services, construction of a new ordnance facility and installation of equipment therein, procuring production equipment, and options for

aining key personnel for and operating a new ordnance facility for the loading of fixed rounds, shells, bombs, fuzes and boosters.

Place: At or near Minden, La.

Estimated Cost of designing, engineering and construction under Title I: \$15,776,944.

Fixed-Fee for designing, engineering and constructing under Title I: \$421,764.

Estimated Cost of procuring equipment under Title II: \$3,138,200.

Fixed-Fee for procuring equipment under Title II: \$20,000.

Estimated Cost of Training Key Personnel under Title III (Optional): \$150,000.

Fixed-Fee for Training Key Personnel under Title III: \$1.00.

Estimated Cost of operation under Title IV (Optional): \$25,100,000.

Fixed-Fee for operation under Title IV: \$420,000.

Payments to be made by Finance Officer, U. S. Army at New Orleans, La.

The new ordnance facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the fol-

lowing procurement authorities, the available balances of which are sufficient to cover the cost of the same:

ORD 9762 P99 A0141-02.

ORD 9763 P99 A0141-02.

ORD 50,179 P510-31 A0025-13.

ORD 50,180 P531-32 A0025-13.

This contract is authorized by the following laws: The Act of July 2, 1940 (Public No. 703, 76th Congress), the Act of March 1, 1941 (Public No. 11, 77th Congress), and the Act of June 30, 1941 (Public No. 139, 77th Congress).

(Sgd.) L. H. CAMPBELL, JR.,

(L. H. Campbell, Jr.)

Brig. Gen., U. S. Army.

(Page 22 placed in index.)

(Page 23 placed in index.)

**Cost-Plus-A-Fixed-Fee  
New Ordnance Facility  
Construction And Operation Contract.**

This Contract, entered into this 3rd day of July, 1941 by The United States of America, hereinafter called the Government, represented by the Contracting Officers executing this contract, and Silas Mason Company, a corporation organized and existing under the laws of the

State of Delaware; of the City of New York in the State of New York hereinafter called the Contractor, witnesseth that:

Whereas, The Government desires to have the Contractor design, construct and equip, and at the option of the Government, train key personnel, prepare to operate a new ordnance facility more particularly described in Title I hereof, for the loading of fixed rounds, shells, bombs, fuzes and boosters; and

Whereas, The accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, As a result of such negotiations, the Secretary of War has directed that the Government enter into a cost-plus-a-fixed-fee contract with the Contractor for the accomplishment of the above-described work;

Now, Therefore, The parties hereto do mutually agree as follows:

## Title I.

### Design, Engineering and Construction.

#### Article 1-A—Description of New Ordnance Facility.

1. The new ordnance facility, hereinafter referred to as the "Plant," and designated as Louisiana Ordnance Plant, shall comprise a plant at or near Minden, La., upon a site to be furnished and made available by the Government, for the loading of fixed rounds, shells,



bombs, boosters and fuzes (hereinafter sometimes referred to as "Ammunition") including manufacture of amatol and of nitrate of ammonia from neutral nitrate of ammonia solution for the foregoing types of Ammunition, having an estimated daily capacity based on a twenty-four (24) hour day as follows:

(a) 96,000 Fixed Rounds 20mm. or equivalent, complete except for detonators;

(b) 8,400 Rounds 155mm. Shell, or equivalent, but without any other components.

(c) 2,880—100-lb. Bombs or equivalent together with auxiliary boosters only.

2. Said Plant shall consist of loading buildings, nitrate of ammonia evaporating and graining buildings, administration buildings, shops, railroads, roads, steam lines, air lines, electric lines, telephone lines, fencing, lighting, power house, dormitories, water and sewer systems, staff dwellings, mess hall, cafeterias, guard quarters, fire fighting equipment and housing thereof, and other buildings and equipment necessary or appropriate for a loading plant of the approximate capacity aforesaid, with storage buildings adequate for about 30 days' supply of incoming materials and about 60 days production of finished product.

3. Said Plant shall conform, insofar as is practicable, with typical designs, drawings, specifications, details, standards or instructions contained in Appendix "A" hereto attached and made a part hereof, which are on file in the offices of the Chief of Ordnance and The Quartermaster General and which shall be promptly furnished to the Contractor, or which will be furnished hereafter

by the Contracting Officer; *Provided, however*, that no portion of said Plant shall consist of a permanent type of construction unless specifically authorized in advance by the Secretary of War; and *Provided further*, that nothing herein shall prevent the use of a type of construction sufficiently substantial for the use intended, in the judgment of the Contracting Officer, as evidenced by his approval of the plans and specifications.

#### Article I-B—Statement of Work.

1. The Contractor shall, in the shortest reasonable time, furnish the labor, materials, tools, machinery, equipment, facilities, utilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the following work:

a. The construction of and the installation of equipment in the Plant described in Article I-A hereof, in accordance with the approved plans and specifications provided hereinafter.

b. The furnishing of all architectural and engineering services covering the design, preparation of drawings, plans and specifications, and field engineering and supervision necessary for the efficient execution and coordination of the construction and installation of equipment of said Plant as provided for hereunder, which services together with other provisions pertaining thereto are more particularly described and hereinafter set forth in Article I-E.

2. Supervision, direction and control of performance provided for in Article I-B shall be as follows:

a. The Contracting Officer appointed by the Chief of Ordnance will supervise the preparation of the general

layout of the project and the detailed plans and working drawings for the operating buildings and their equipment, including process steam generating plant and explosive storage buildings.

b. The Contracting Officer appointed by The Quartermaster General will supervise the preparation of the detailed plans and working drawings for roads, railroads, sewerage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance. All designs must have the concurrence of the Contracting Officer appointed by the Chief of Ordnance.

c. Performance of the construction work of the entire project will be under the supervision of the Contracting Officer appointed by The Quartermaster General.

#### Article I-C—Estimates.

1. It is estimated that the total cost of the work under this Title I will be approximately Fifteen Million Seven Hundred Seventy-Six Thousand Nine Hundred Forty-Four Dollars (\$15,776,944.00), excluding the Contractor's fee and the procurement of production equipment provided for in Title II hereof.

2. It is estimated that the completed Plant will be ready for utilization by the Government within nine (9) months after the approval date of this contract.

3. It is expressly understood that the Contractor does not guarantee the correctness of any of the estimates set forth in this Article I-C. The estimated total costs set

forth in this Article I-C are based upon the data now available and agreed to by both the Government and the Contractor, copies of which are on file in the offices of the Chief of Ordnance and The Quartermaster General.

#### Article I-D—Consideration.

1. As consideration for its undertaking under this Title I the Contractor shall receive the following:

a. Reimbursement for expenditures as provided in Title V.

b. Rental for Contractor's equipment as provided in Title V.

c. A fixed-fee in the amount of Four Hundred Twenty-One Thousand Seven Hundred Sixty-Four Dollars (\$421,764.00) which shall constitute complete compensation for the Constructor's services, including profit and all general overhead expenses.

2. The Contractor's fixed fee stipulated herein is based upon the understanding that the Contractor will subcontract portions of the work under this contract as follows (if none, so indicate):

Item	Kind of Work
1. Normal Mechanical Items.	
2. Heating and ventilating.	
3. Plumbing.	
4. Electric Wiring.	



If work of categories other than or in addition to those mentioned above is sublet, or if work included in any of the above categories is performed by the Contractor's own force, all with the written approval of the Contracting Officer, the fixed-fee of the Contractor shall be decreased or increased accordingly, by an equitable adjustment on the basis of the decrease or increase of services made necessary by such changes.

**Article I-E—Character and Extent of Architectural and Engineering Services.**

1. The Contractor shall, in the shortest reasonable time, perform the following services:

a. Make all necessary topographical and other surveys and maps; arrange for and supervise necessary test borings and other subsurface investigations.

b. Prepare layout plan of the proposed project and obtain approval thereof.

c. Prepare preliminary studies, sketches, and reports for all structures, utilities and appurtenances.

d. Adapt Government designs, drawings, specifications and standards for buildings and other structures as necessary to meet the requirements of the approved layout of the proposed project, and prepare detailed designs, specifications and drawings in required form for which Government designs are incomplete or unavailable.

e. Obtain necessary permits and approvals from all local, State and Federal authorities. Should it become necessary in the performance of the work and services

for the Contractor to secure the right of ingress or egress to perform any of the work required by this Title I hereof on properties not owned or controlled by the Government, the Contractor shall, if practicable, secure the consent of the owner, his representative, or agent, prior to effecting entry on such property. In the event the owner requires the payment of any fee for a license to enter upon and/or use such property, the Contractor when so directed by the Contracting Officer, shall pay such fee and obtain a receipt therefor.

f. Prepare estimates of the material quantities involved in the proposed project.

g. When preliminary drawings are approved by the Contracting Officer, prepare final designs, detailed working drawings and specifications in accordance with Government standards necessary for the effective coordination and efficient execution of the construction work and revise the drawings and specifications as required by the Contracting Officer. Drawings shall be prepared for permanent record, inked in on linen or as otherwise directed by the Contracting Officer, but in no case will these drawings be prepared in pencil or on paper; the specifications shall be mimeographed to produce the number of copies required by the Contracting Officer. There shall be included in the specifications all provisions which the Contracting Officer may direct to have incorporated therein relating to the advertising, negotiating, awarding of contract, conditions under which the work shall be done, and any special provisions required by statute or existing War Department regulations or instructions.

h. Prepare an estimate of the cost of the proposed project based on the approved designs, drawings and specifications therefor.

i. Assist the Contracting Officer in obtaining, analyzing and evaluating proposals or bids for a construction contract or contracts based upon the approved drawings and specifications.

j. Prepare record drawings in required form, or correct drawings and specifications to show construction as actually accomplished; assist in preparation of the completion report for the project; and furnish for the approval of the Contracting Officer:

(1) Schedules and charts showing the sequence of operations in the construction of each of the several portions of the work,

(2) Estimates showing the amounts of critical and important materials and dates when such materials will be required on the site.

(3) Labor estimates showing the approximate number, trades and dates required to meet the schedule in (1) above,

(4) In addition to the requirements of Paragraph "i" of this Section 1 of Article I-E, periodical progress reports as required by the Contracting Officer showing the progress of the work and any deviation from the schedule in (1) above.

k. Establish a permanently monumented base line, all governing lines, bench marks and grades, tied into the North American Datum unless specifically exempted by written instructions of the Contracting Officer.

l. Supervise the work included in this Title I to insure the construction of every part of the work in ac-

cordance with the approved drawings and specifications referred to in Paragraph "d" of this Section 1 of Article I-2, and within the areas and boundaries designated for the project.

m. Check and approve all shop and work drawings submitted in connection with the construction work to assure that they conform with approved drawings.

n. Make such field and laboratory tests of concrete and concrete aggregates and all other materials at the site or at any time or place as the Contracting Officer may require. Inspect and report to the Contracting Officer in writing as to the conformity or non-conformity of the workmanship and materials to specifications; and on the progress of the project.

o. Upon termination or completion of this contract, as determined by the Contracting Officer, and before final payment of the fixed-fee, the Contractor shall correct all permanent tracings to the satisfaction of the Contracting Officer to show all changes in the actual construction from the original drawings.

p. Without additional compensation the Contractor, or any member of the organization, when requested, shall consult and advise with the Contracting Officer on any questions which may arise in connection with the work.

q. Perform all other architectural and engineering services within the scope of this contract, required by the Contracting Officer.

r. The Contractor shall promptly, after the execution of the contract, prepare and submit to the Contracting Officer, for approval, a schedule showing the order in



which the Contractor proposes to carry on the work, with dates on which he will start the several salient features of the work and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart at suitable scale so as to indicate with symbols the percentage completed at any time. The Contractor shall correct the progress schedule at the end of each week and shall immediately deliver to the Contracting Officer three copies of the same.

s. The Contractor shall furnish sufficient technical supervisory and administrative personnel to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the Contracting Officer, the Contractor falls behind the progress schedule, the Contractor shall take such steps as may be necessary to improve his progress and the Contracting Officer may direct him to increase working days per week, or hours of labor per day and failure to comply with such directions shall be deemed sufficient cause to terminate the contract.

t. When in the opinion of the Contracting Officer the Contractor's personnel and/or overhead is excessive for the proper performance of this contract, reductions thereof shall be made as required by the Contracting Officer.

2. The Government shall furnish the Contractor such available schedules of preliminary data, layout sketches, and other available information respecting sites, topography, soil conditions, outside utilities and equipment, and shall make available to the Contractor such Government designs, drawings, specifications, details, standards and safety practices as are on hand in the office of the Chief of Ordnance and The Quartermaster General and are applicable to the design, construction, and equipping of the said Plant.

3. All of the Contractor's notes and other data concerning the design, construction and equipping of the Plant shall become the property of the Government and the Government shall have full right to use said notes and other data for any purpose it may desire, without any such claim on the part of the Contractor for additional compensation. All such notes and other data shall be delivered to the Government whenever requested by the Contracting Officer and, further, access to such notes and data shall be restricted to trusted and duly authorized representatives of the Government and of the Contractor.

4. Expert Technical Assistance. When in the judgment of the Contractor the complexity and nature of the project are such as to require expert technical assistance, or services, or advice in connection with special phases of the work such as site planning, manufacturing processes, or other problems of a highly technical character, the Contractor may employ directly or by a service contract with the consent and approval of the Contracting Officer, such supplemental professional services as are necessary for the proper design and execution of the project.

#### Article I-F—Rates of Wages—Non Rebate.

1. In accordance with the act of August 30, 1935 (49 Stat. 1011; 40 U. S. C. 276a and 276a 1), the following provisions shall apply to the work under this Title I:

a. The Contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of

payment, computed at wage rates not less than those established by the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Contracting Officer shall have the right to withhold from the Contractor so much of accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed by the Contractor or any subcontractors on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors, or their agents.

b. In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise and the Contractor shall be liable to the Government for any excess costs occasioned the Government thereby.

2. The following provisions shall apply to the work under this Title I:

a. Should the Contractor or any subcontractor pay to any laborer or mechanic a wage based upon a rate

in excess of the wage rate for the classification in which said laborer or mechanic is included as established for the work by the Secretary of Labor, such increased wage shall be at the expense of the Contractor and shall not be reimbursed by the United States. When, in connection with the audit and check by the Contracting Officer or his authorized representative, of the Contractor's pay rolls, prior to reimbursement as contemplated in Section 1 of Article I-D hereof, it is found that one or more laborers and/or mechanics have been paid wages at rates in excess of the wage rates, established for such laborers and/or mechanics, the reimbursement made to the Contractor on account of such pay rolls will not include such excess payments. The provisions of this Section shall not apply when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer.

b. The Contractor shall furnish to the Government representative in charge at the site of the work covered by this contract, or if no Government representative is in charge at the site, shall mail to the Federal agency contracting for the work, within 7 days after the regular payment date of each and every weekly pay roll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Register of March 1, 1941, 6 F. R. 1211, or any modification thereof pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code title 40, sections 276 b. and c.), sworn to by the Contractor or the subcontractor concerned or by the authorized officer or employee of the Contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates



have been or will be made either directly or indirectly to or on behalf of the Contractor or such subcontractor from the full weekly wages earned as set out on such pay roll; and that no deductions, other than permissible deductions, as defined in the said regulations pursuant to said act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly, from the full weekly wages earned as set out on such pay roll.

The Contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the act of June 13, 1934, and the requirements of this Paragraph of the contract shall be subject to all applicable provisions of such regulations.

The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this Paragraph.

#### Article I-G—Eight-Hour Law—Overtime Compensation.

No laborer or mechanic doing any part of the work contemplated by this Title I, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this Title I shall be computed on a basic rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition, that

every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this Article a penalty of five dollars shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this Article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 5 (b) of Public Act No. 671, 76th Congress, approved June 28, 1940, and Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

## Title II.

### Procurement of Production Equipment.

#### Article II-A—Statement of Work.

1. The Contractor shall, in the shortest reasonable time, determine the production equipment requirements for the Plant and shall, subject to the approval of the Contracting Officer, thereupon proceed to do all things necessary and incident to the procurement of the production equipment requirement.

2. The Government reserves the right to furnish any production equipment necessary for the equipping of the Plant, provided such production equipment so to be fur-

nished is of a suitable type and in satisfactory operating condition, upon so notifying the Contractor prior to any commitment by the latter therefor. In the equipping of the Plant the Contractor shall be free (but shall not be obligated) to use any production equipment of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such production equipment will be supplied, which prices and conditions, however, shall not be less favorable than those quoted to third parties for similar quantities and deliveries, and may be quoted without regard to the provisions of Section 6 of Article V-A of Title V. In the event the Government is able to obtain production equipment of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such equipment.

#### Article II-B—Estimates.

It is estimated that the total cost under this Title II will be approximately Three Million One Hundred Thirty-eight Thousand Two Hundred Dollars (\$3,138,200.00), exclusive of the Contractor's fee. It is expressly understood, however, that the Contractor does not guarantee the correctness of this estimate. The estimated total cost set forth in this Article II-B is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the office of the Chief of Ordnance.

#### Article II-C—Consideration.

As consideration for its undertaking under this Title II the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V.

2. A fixed-fee in the amount of Twenty Thousand Dollars (\$20,000.00), determined by negotiations between the Contractor and the Chief of Ordnance, which shall constitute complete compensation for the Contractor's services, including profit other than that included in the prices quoted pursuant to Section 2 of Article II-A of this Title II.

Article II-D—Eight Hour Law—Overtime Compensation.

The provisions of Article I-G of Title I shall apply to the work under this Title II.

### Title III.

#### Training of Key Personnel (Optional).

Article III-A—Statement of Work.

1. The obligation of the Contractor to proceed with the work under this Title III shall be conditioned upon receipt by the Contractor of notice in writing from the Contracting Officer so to do, and the prior appropriation and allocation of funds necessary therefor. Upon receipt by the Contractor of such notice, the Contractor shall hire or select the key personnel necessary for the operation of the Plant, and when such personnel is available shall proceed to train such personnel in the duties and functions of their respective positions, at the Con-



tractor's plants or elsewhere, in order that they will have obtained experience with the processes and operations involved in the Plant at any time when the Government shall exercise its option under Section 1 of Article IV-A of Title IV.

2. After completion of the work under Section 1 of this Article III-A, the Contractor shall, if directed by the Contracting Officer, until a date not in excess of twelve (12) months after the approval of this contract, hold the group of key personnel trained hereunder in readiness for operation of the Plant should the Government exercise its option under Section 1 of Article IV-A of Title IV.

3. The extent and character of the work to be done by the Contractor under this Title III shall be subject to the approval of Contracting Officer to whom the Contractor shall report and be responsible. In the event that there should be any dispute with regard to the extent and character of the work to be done the matter shall be determined as provided in Article VII-N of Title VII.

#### **Article III-B—Estimate.**

It is estimated that the cost of the work under this Title III will be approximately One Hundred Fifty Thousand Dollars (\$150,000.00), exclusive of the Contractor's fee. It is expressly understood that the Contractor does not guarantee the correctness of this estimate. The estimated total cost set forth above is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the Office of the Chief of Ordnance.

### **Article III-C—Consideration.**

As consideration for its undertaking under this Title III the Contractor shall receive the following:

1. Reimbursement for expenditures as provided in Title V.
2. A fixed-fee of One Dollar (\$1.00) which shall constitute complete compensation for the Contractor's services under this Title III, including profit.

### **Article III-D—Eight Hour Law—Overtime Compensation.**

The provisions of Article I-G of Title I shall apply to the work under this Title III.

## **Title IV.**

### **Operation of Plant (Optional).**

#### **Article IV-A—Statement of Work.**

1. The obligation of the Contractor to proceed with the work under this Title IV shall be conditioned upon receipt by the Contractor of the notice provided for in Section 1. of Article III-A of Title III hereof and receipt by the Contractor within twelve (12) months after the date of approval of this contract of notice in writing from the Contracting Officer so to do, and the prior appropriation and allocation of funds necessary therefor. Immediately upon receipt by the Contractor of such notice, and concurrently with the performance of the work required of it under Titles I, II and III hereof, the Contractor shall undertake all preparations necessary for the subsequent operation of the Plant, including the necessary training of personnel for such operation in addi-

tion to the key personnel trained pursuant to Title III hereof, and all other services incident to setting up an efficient and going operating force.

2. As each operating unit of the Plant is completed and ready for operation and the necessary preparation for operation and training of personnel has proceeded to a point where operation is practicable the Contractor shall proceed to operate it as directed from time to time by the Contracting Officer, irrespective of whether or not the construction and equipping of the Plant as a whole shall have been completed.

3. Notwithstanding the fact that the construction and equipping of the Plant as a whole shall not have been completed, when all operating units thereof are completed and ready for operation without incurring hazards because of the lack of completion of the construction and equipping of the Plant as a whole beyond those usual in the normal operation of a plant of the type provided for herein, the Contractor shall so notify the Contracting Officer in writing, and from and after the date of said notice the Contractor shall operate said Plant for a period of twelve (12) months.

4. Upon written notice to the Contractor not less than ninety (90) days before the anticipated completion of the operation provided for in Section 3 next above, the Government may, at its option, authorize the continued operation of the Plant for an additional period of twelve (12) months and the Contractor shall undertake such continued operation under the terms and condition of this contract applicable to the operation of the Plant (including those relating to the Fixed-fee for such additional operation, which fee shall be that provided in Section 3 of Article IV-C, hereof). Further continued

operation, if any, of said Plant by the Contractor after said additional operation shall be subject to mutual agreement.

5. The work under this Title IV shall be performed in accordance with the current applicable specifications which will be furnished by the Contract Officer.

6. The Government shall furnish all explosives, including neutral nitrate of ammonia solution for the manufacture of nitrate of ammonia, and all metal parts for the loading of the Ammunition, including shipping materials and containers when and as requisitioned from time to time by the Contractor, to be delivered when required, f. o. b. said Plant, in sufficient quantities to enable the Contractor to carry on the operation of the Plant provided for in this Title IV. The Contractor shall be under no obligation to accept or store or permit to be stored at said Plant any explosives which would render the work to be done by the Contractor hereunder hazardous beyond what is usual in the normal operation of a plant of the type provided for herein.

7. In carrying out the work under this Title IV the Contractor is authorized and shall do all things necessary or convenient in the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor), the providing of all materials and supplies except such as the Government is to furnish or supply as elsewhere specifically provided herein, the storage of materials and supplies and of the finished products to the extent of the storage facilities at said Plant, the preparation of the product for shipment and the loading of same on cars or



other carriers in accordance with the Government's shipping instructions.

8. In providing materials and supplies as provided in Section 7, next above, the Contractor shall be free (but shall not be obligated) to use any materials or supplies of its own manufacture, upon advising the Government in advance as to the prices at which and the conditions upon which such materials and supplies will be provided, which prices and conditions, however, shall not be less favorable than those quoted to third parties for similar quantities and deliveries, and may be quoted without regard to the provisions of Section 6 of Article V-A of Title V. In the event the Government is able to obtain materials or supplies of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within ten (10) days after being advised of the Contractor's price for such material and supplies.

9. The Contractor shall maintain a satisfactory system of inspection, gage and gaging checking concurrent with operations, and no ordnance materiel shall be submitted for the Government inspector's approval which has not previously been inspected by agents of the Contractor and found to be up to the contract standard.

#### Article IV-B—Estimates.

It is estimated that the cost of the work under this Title IV will be Twenty-five Million One Hundred Thousand Dollars (\$25,100,000.00), exclusive of the cost of continued operation covered by the option therefor provided in Section 4 of Article IV-A hereof, and exclusive of the Contractor's fee. It is expressly understood that

the Contractor does not guarantee the correctness of this estimate. The estimated total cost set forth above is based upon an estimate agreed to by both the Government and the Contractor, a copy of which is on file in the Office of the Chief of Ordnance.

#### Article IV-C—Consideration.

As consideration for its undertaking under this Title IV the Contract shall receive the following:

1. Reimbursement for expenditures as provided in Title V hereof.

2. A fixed-fee for operation provided in Section 3 of Article IV-A hereof, as follows: Four Hundred Twenty Thousand Dollars (\$420,000.00) for twelve (12) months operation, which fee shall constitute complete compensation (except for continued operation) for Contractor's services, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

3. A fixed-fee for continued operation provided in Section 4 of Article IV-A hereof, as follows: Four Hundred Twenty Thousand Dollars (\$420,000.00) for twelve (12) months operation, which fee shall constitute complete compensation for Contractor's services during continued operation, including profit, other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

#### Article IV-D—Walsh-Healey Act.

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of

June 30, 1936; 49 Stat. 2036; 41 USC 35-45), shall apply to the operation of the Plant under this Title IV of this contract:

a. The Contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

b. All persons employed by the Contractor in the manufacture or furnishing of all materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under the contract; provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

c. No person employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

d. No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the Contractor in the manufacture

or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

e. No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in the plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the state in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this paragraph.

f. Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of \$10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel the same and to make open market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the



name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered; Provided, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the Contractor of the withholding or recovery of such sums by the United States of America.

g. The Contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the Act available for inspection by authorized representatives of the Secretary of Labor.

h. The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of \$10,000.00

2. Paragraph b of Section 1 of this Article IV-D with respect to wages is inoperative due to lack of determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved.

#### Article IV-E—Neutrality Act.

Subsection 12 (g) of the Joint Resolution approved by the President, November 4, 1939, provides:

"No purchase of arms, ammunition, or implements of war shall be made on behalf of the United States by any

officer, executive department, or independent establishment of the Government from any person who shall have failed to register under the provisions of this joint resolution."

A copy of the Contractor's Certificate of Registration shall be filed in the Office of the Chief of Ordnance.

## **Title V.**

### **Cost of the Work and Payment Therefor.**

#### **Article V-A—Reimbursement for Contractor's Expenditures.**

1. The Contractor shall be reimbursed in the manner hereinafter described for such of its actual expenditures in the performance of the work under this contract, as may be approved or ratified by the Contracting Officer, and as are included in the following items:

a. All labor, materials, tools, machinery, equipment, facilities, supplies, utilities and services necessary for either temporary or permanent use for the benefit of the work, including the training of operating personnel. Unless otherwise directed in writing by the Contracting Officer, all articles of machinery or equipment valued at \$300 or less shall be classed as tools and shall be charged directly to the work.

b. All subcontracts made in accordance with the provisions of this contract.

c. Transportation, loading, unloading and storage charges on materials, supplies, and equipment.

d. Transportation and traveling expenses to and from the site of the Plant of the necessary field forces for the economical and successful prosecution of the work; transportation and traveling expense of such other employees of the Contractor whose full time is devoted to the work under this Contract as is actually incurred in connection with such work; and costs and expenses reimbursed to permanent employees of the Contractor transferred to or from the Plant on account of transportation of themselves, their families and their household goods.

Reimbursement for transportation and traveling expenses will be limited to the cost of transportation including Pullman where necessary and an allowance of Six Dollars (\$6.00) per day in lieu of all other expenses. Transportation by automobile in such required travel shall be reimbursed at the rate of Five Cents (\$.05) per mile as representing the actual cost of such transportation.

All travel shall be either authorized or approved in writing by the Contracting Officer. Should the Contractor, or any representative thereof, remain in a travel status in excess of six (6) days at any one time, not including the time consumed in travel, the cost for such excess travel status shall be at the expense of the Contractor, unless otherwise ordered in writing by the Contracting Officer.

e. Expenses of producing labor and expediting the production and transportation of material supplies and equipment.

f. Salaries of employees of the Contractor engaged directly on the work provided hereunder whether at the Plant or employed full time at the Contractor's offices.

In case the full time of any employee of the Contractor at the Plant is not applied to the work, his salary shall be included in this item in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of construction or operation, chief engineer, chief purchasing agent, chief accountant, or similar position in the Contractor's organization at the Plant, or as principal assistant to any such person until there has been submitted to and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications, and experience of the person selected for such assignment. The regular salary or compensation rate of any such person shall not be in excess of the highest salary or compensation rate received by him during the year preceding the date of this contract plus such increase as the Contracting Officer may approve. The payment of any excess salary over such scheduled amounts shown in the approved salary schedule agreed to at the time and as shown in the record of negotiations for this contract shall not be reimbursable, unless and until the Chief of the Supply Arm or Service has so approved in writing.

g. Necessary temporary buildings and the equipment therefor and the cost of maintenance and operation thereof; provided, however, that the costs and expenses of equipment and operating cafeterias and commissaries shall be reimbursed only as provided in the procedure relating thereto approved by the Contracting Officer.

h. Premiums on such bonds and insurance policies as the Contracting Officer may approve or require as reasonably necessary for the protection of the Government or the Contractor.



i. Losses and expenses, not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer), actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable unless reimbursement therefor is expressly prohibited.

j. The cost of reconstructing and replacing any of the work destroyed or damaged, and not covered by insurance, but expenditures under this item must have the written authorization of the Contracting Officer in advance.

k. Payments made by the Contractor under the Social Security Act (employer's contribution) and any disbursements required by law which the Contractor may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel; and, if approved in writing by the Contracting Officer in advance, permit and license fees and royalties on patents used including those owned by the Contractor.

l. While the Contractor shall make every reasonable effort to have the finished product conform to the drawings and specifications referred to in Title IV hereof, it is recognized that variances therefrom are unavoidable and the Contractor shall be allowed all costs determined in accordance with this Article for re-working material because of rejection and for material finally rejected.

m. In connection with the work under Title IV only, extra compensation to employees, discontinuance wages and charges under welfare and other employee relations plans maintained by the Contractor; Provided that the

Government shall be chargeable therefor only insofar as the same are consistent with the general employee relations policies existing throughout the Contractor's organization, or are incurred pursuant to agreement made as a result of collective bargaining with the representatives of employees, and are expressly authorized in writing by the Contracting Officer.

n. Accounting (including salaries and other expenses) in connection with special audits of accounts for the government in connection with work hereunder.

o. Expenses in connection with any temporary or permanent closing down of the plant.

p. 1. The fixed amount of One Thousand Dollars (\$1,000.00) per month for each calendar month, of operation, payable at the close thereof, subsequent to the commencement of the complete operation provided in Section 3 of Article IV-A of Title IV (including continued operation under Section 4 of such Article IV-A), as complete compensation, including all general overhead, for all services performed by the Contractor at its New York, N. Y., offices in connection with the work under Title IV hereof, except for the wages, salaries and transportation and traveling expenses of employees of the Contractor who devote full time to the work under such Title IV. The initial amount shall be payable at the close of the calendar month during which such operation commences.

2. For the purposes of this paragraph p, the term "full time" shall be deemed to refer to the time of employment of those employees engaged solely upon the work under this contract and who are carried on payrolls separate from the Contractor's payrolls relating to

its other business and not to employees of the Contractor engaged part time of the work under this Contract and part time on the Contractor's other business.

q. Disbursements incident to payment of payrolls, including but not limited to, the cost of disbursing cash, necessary guards, cashiers and pay masters. If payments to employees are made by check, facilities for cashing checks must be provided without expense to employees, and the Contractor shall be reimbursed therefor.

r. Rental actually paid by the Contractor, at rates not to exceed those approved by the Contracting Officer, for construction plant in sound and workable condition exceeding \$300 in value as may be necessary for the proper and economical prosecution of the work. Each contract for the rental of construction plant or parts thereof by the Contractor from third parties shall be in a form prescribed by the Contracting Officer, shall be subject to his approval and shall include provisions (1) that the lessor deliver to the Government title to such construction plant or parts thereof free of all liens and encumbrances when and if the total rental paid to the lessor for any item of construction plant or part thereof shall equal the valuation thereof, plus one per cent (1%) per month for each month or fraction thereof such part has been in use, and (2) that at the completion of the work being performed under the principal contract or upon termination of the contract as provided in Article CI, the Government may at its option purchase any part of such construction plant by paying to the lessor the difference between the valuation of such part or parts, plus one per cent (1%) per month for each month or fraction thereof such part or parts have been in use and the total rentals theretofore paid for such part or parts, provided, however, that either of such provisions may be

omitted from such rental agreements if the omission is approved by the Chief of Supply, Arm or Service.

s. Loading and unloading of construction plant, owned or rented by the Contractor and of such repair parts and spare parts as are not included in the rental and as are not made necessary by defects in such plant, or parts thereof or by the fault or negligence of the Contractor or his employees; the transportation thereof to the place or places where it is to be used in connection with said work and return transportation to the point of original shipment or equivalent mileage, provided that the cost of return transportation shall not exceed the cost of transportation to the point of original shipment and provided that charges for transportation over distances in excess of 500 miles must have the written authorization of the Contracting Officer in advance; and the installation and dismantling thereof.

t. Repairs and repair work, as are not included in the rental or made necessary by the fault or negligence of the Contractor or his employees.

, u. Temporary rights in land required in connection with the work.

v. Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

2. Rental for Contractor's Equipment. Rental shall be paid at the rates indicated in the "Contractor's Equipment Rental Schedule, War Department, Office of The Quartermaster General", dated May, 1941 for such plant



or parts thereof as he may own and furnish as shown in the record of negotiations, both of which documents are on file in the Office of The Quartermaster General. Except as specified below such rental shall begin at the date of delivery of the plant, or parts thereof, to a common carrier for shipment to the site of the work, as evidenced by bill of lading or other satisfactory evidence covering such shipment. In the event the plant or parts thereof, is conveyed by the Contractor, the rental shall start at time transport to the site begins, but shall not exceed the equivalent time of shipping by common carrier. Unless title thereto passes to the Government at an earlier date, the rental shall terminate on the date of notice by the Contracting Officer to the Contractor that such plant or parts thereof are no longer required provided that rental shall continue to the date shipment of such plant or parts thereof is initiated, if such shipment is initiated without delay. If such plant, or any part thereof, is not in sound and workable condition when it arrives at the site of the work, the rental period thereof shall not begin until such plant, or parts thereof, shall have been placed in sound and workable condition at the expense of the Contractor, and no rental therefor shall be paid for any prior period. If such plant, or parts thereof, cannot be placed in sound and workable condition, no transportation charges for the shipment thereof shall be included in the cost of work or paid, either directly or indirectly, by the Government. Determination as to whether such plant, or parts thereof, are in sound and workable condition shall, in every instance, be made by the Contracting Officer. Slight delays in the use of such plant, or parts thereof, caused by necessary minor or field repairs and replacements shall not interrupt the rental period, but no rental shall be paid for the period of any delay in the use of such plant, or parts thereof, caused by other than necessary minor or field repairs.

The value shown in the record of negotiations hereinbefore referred to shall be deemed final unless the Contracting Officer shall, within ten days after the machinery has been set up and working, modify or change such valuation. When and if the total rental paid to the Contractor for any such part shall equal the valuation thereof, plus one per cent (1%) per month for each month or fraction thereof such part has been in use, and the Contractor shall convey title thereto to the Government free of all liens and encumbrances; at the completion of the work or upon termination of the contract as provided in Title VI, the Government may at its option purchase any part of such construction plant by paying to the Contractor the difference between the valuation of such part or parts, plus one per cent (1%) per month for each month or fraction thereof such part or parts have been in use and the total rental theretofore paid for such part or parts.

#### General.

3. The Government reserves the right to furnish any materials, construction equipment, machinery, tools, or services, including communication services necessary for the completion of the work. The Contractor shall cause the foregoing equipment and machinery to be suitably marked with an identifying mark or symbol, indicating that such items are the property of the United States. Upon the completion of this contract or upon demand, the Contractor shall return such equipment and machinery to the place designated by the Contracting Officer.

4. The Government reserves the right to pay directly to common carriers any and all transportation charges on construction plant, materials, machinery, equipment and supplies.

5. The Government reserves the right to pay to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

6. No salaries of the Contractor's executive officers or partners, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized in Section 1 of this Article, shall be included in the cost of the work under this contract; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

7. The Contractor shall, to the extent of its ability, take all cash and trade discounts, rebates, allowances, credits, salvage, commissions and bonifications, and when unable to take advantage of such benefits, it shall promptly notify the Contracting Officer to that effect and the reason therefor. In determining the actual net cost of articles and materials of every kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage, commissions and bonifications which have accrued to the benefit of the Contractor or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault or neglect on the part of the Contractor, or lost through fault of the Government, or lost through compliance with the provisions of Section 5 of Article V-C, shall not be deducted from gross costs.

8. All revenue from the operation of the hospital or other facilities, except commissaries and cafeterias, or from rebates, discounts, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work. Revenue from the operations of the



commissaries and cafeterias shall be accounted for as provided in the procedure approved by the Contracting Officer under paragraph g, Section 1, of this Article V-A.

#### Article V-B—Payments.

##### Reimbursement For Cost.

1. a. The Government will currently reimburse the Contractor for expenditures made in accordance with Article V-A of this Title V, upon certification and delivery to and verification by the Contracting Officer of the original signed pay rolls for labor, the original receipted invoices for materials, equipment, etc., or other original papers satisfactory to the Contracting Officer. Reimbursement will be made as promptly as possible, generally weekly, but may be made at more frequent intervals if the conditions so warrant. All payments made under this paragraph a of Section 1 shall be subject to the provisions of Article V-C.

b. Payment of the sums provided in subparagraph 1 of paragraph p, of Section 1 of Article V-A shall be made as provided therein.

2. Rental for Contractor's Equipment. Rental as provided in Section 2 of Article V-A of this Title V, for such construction plant or parts thereof as the Contractor may own and furnish shall be paid monthly upon presentation of proper vouchers.

##### Payment of the Fixed-Fees.

3. a. The fixed-fee provided for in Article I-D of Title I shall be paid in partial payments, less ten percent (10%) of each partial payment, on the last working day



of each calendar month from and after the approval date of this contract, as it accrues, based upon estimates made by the Contractor and approved by the Contracting Officer of the percentage of completion of the work and services provided for in Title I.

b. The fixed fee provided for in Article II-C of Title II shall be paid in partial payments, less ten percent (10%) of each such partial payment, on the last working day of each calendar month from and after the approval date of this contract, as it accrues, based upon estimates made by the Contractor and approved by the Contracting Officer of the percentage of completion of the work and services provided for in Title II.

c. The fixed-fee of One Dollar (\$1.00) provided for in Article III-C shall be paid upon the completion of the work provided therein.

d. 1. The fixed-fee of Four Hundred Twenty Thousand Dollars (\$420,000.00) provided for in Section 2 of Article IV-C of Title IV shall be paid in twelve (12) partial payments of Thirty-five Thousand Dollars, (\$35,000.00) each, less 10% of each such partial payment, the first such partial payment to be payable on the last working day of the calendar month during which operation of the completed plant shall have commenced under Section 3 of Article IV-A of Title IV and the remaining partial payments to be payable on the last working day of the next succeeding eleven (11) months.

2. The fixed-fee of Four Hundred Twenty Thousand Dollars (\$420,000.00) for continued operation provided for in Section 4 of Article IV-A of Title IV shall be paid in twelve (12) partial payments of Thirty-five Thousand Dollars (\$35,000.00) each, less 10% of each such partial

payment the first such partial to be, payable on the last working day of the calendar month during which the additional operation provided for in such Section 4 of Article IV-A of Title IV shall have commenced; and the remaining partial payments to be payable on the last working day of the next succeeding eleven (11) months.

#### **Payments By Contractor.**

3. If bills for purchase of materials, machinery, or equipment, or payrolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor under this contract are not promptly paid by the Contractor or subcontractor; as the case may be, the Contracting Officer may, in his discretion, withhold from payments otherwise due the Contractor an amount equivalent to the amount of any such bill or payroll until such bill or payroll is paid. Should the Contractor neglect or refuse to pay such bills or payrolls or to direct any subcontractor to pay such bills or payrolls within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills or payrolls directly provided such bills or payrolls are not disputed in good faith by the Contractor or subcontractor, and if such event a deduction equal to five per cent (5%) of the amount so paid directly shall be made from the Contractor's fee.

#### **Final Payment.**

4. Upon completion of the work under Titles I and II and its final acceptance in writing by the Contracting Officer, and again upon the completion of the work under Title IV, the Government shall pay to the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sum that may be

necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

#### Article V-C—Advances.

1. At any time, and from time to time, after the execution of this contract the Government, at the request of the Contractor, and subject to the approval of the Chief of Ordnance as to the necessity therefor, shall advance to the Contractor without payment of interest thereon by the Contractor, a sum or sums not in excess of thirty percent (30%) of the estimated cost of the work under this contract (as increased or decreased pursuant to the provisions of Article VII-C of Title VII or as increased pursuant to the provisions of Article IV-A of Title IV). When approximately sixty percent (60%) of said estimated cost (as increased or decreased pursuant to the provisions of Article VII-C of Title VII or as increased pursuant to the provisions of Article IV-A of Title IV) shall have been paid under Section 1 of Article V-B, a revised estimate of such costs shall be made by the Contractor; and if it appears that the then estimated cost exceeds the amount of the original estimate (increased or decreased as provided above), and the revised estimate is approved by the Chief of Ordnance, the Government shall under the conditions stated above advance to the Contractor without interest, not to exceed thirty percent (30%) of such excess. Such

advance or advances shall be made in each case upon the furnishing of such surety bonds in such penal sums not exceeding the total aggregate advance as the Secretary of War may prescribe; Provided, that the Secretary of War shall have prescribed the furnishing of a surety bond in connection with such advances, as security additional to that provided for in this contract; and Provided, Further, that if at any time the Secretary of War deems the security for any advance or advances theretofore made inadequate, the Contractor shall furnish on demand such other security, in the form of a surety bond or surety bonds, as will be satisfactory to the Secretary of War but at no time shall the Contractor be required to maintain in force a surety bond or surety bonds, the total aggregate penal sums of which exceed the aggregate amount of the advances authorized by the Secretary of War under this contract. It is understood that the Government will advance to the Contractor, pursuant to this Article V-C, the sums currently necessary to the Contractor for working capital to carry on the work contemplated under this contract, not in excess of thirty percent (30%) of the estimated cost of such work.

2. Whenever there shall be paid to the Contractor, pursuant to Section 1 of Article V-B reimbursement which, when added to the advance payment or payments made pursuant to Section 1 of this Article V-C, shall equal the full amount of the estimated cost of said work under this contract (as increased or decreased pursuant to the provisions of Section 1 of this Article V-C), no additional payment on account of said work shall be made to the Contractor by the Government until said advance payments are expended; Provided, however, that if the total cost of the work shall be in excess of the amount so paid to the Contractor including said advance payments, the Government, upon presentation



of satisfactory evidence, shall currently and promptly reimburse the Contractor to the extent of such excess cost (subject to any delay in the availability of appropriated funds); Provided, further, that if upon termination of the contract for other than the default of the Contractor there shall remain due the Government from the Contractor any sum theretofore advanced by the Government under this contract and not fully liquidated as above provided, the same shall be applied against any payment due the Contractor and any remaining balance of such sums shall be returned to the Government forthwith after final audit by the Government of all accounts hereunder.

3. In the event of cancellation or termination of this contract because of the default of the Contractor, the Contractor agrees to return to the Government, upon demand, without set-off any sum alleged to be due the Contractor, the outstanding balance of any advance payment; Provided, however, that the Contractor may retain in the account an amount sufficient to meet the outstanding obligations incurred by it in good faith under this contract pursuant to authorization by the Contracting Officer until assumption and discharge of such obligations by the Government or final disallowance thereof. Furthermore, if, in the opinion of the Chief of Ordnance, the unliquidated balance of the advance or advances made by the Government under this contract exceeds the amount necessary for the current needs of the Contractor, as determined by the Chief of Ordnance, the amount of such excess shall, upon demand made by the Chief of Ordnance, be promptly returned to the Government and will be credited against the balance due the Government for advances previously made. If the demand made in either event set forth above is not met within fifteen (15) days after the receipt of such de-

mand by the Contractor, the amount demanded will bear interest at the rate of six percent (6%) per annum from the date of the demand until payment is made.

4. All funds received as advance payments under this contract together with all funds received as reimbursements for the cost of the work under paragraph a of Section 1 of Article V-B of this contract, shall be deposited in a special bank account or accounts separate from the Contractor's general or other funds in a bank which is a member of the Federal Reserve System. Such special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose and shall be used by the Contractor exclusively as a revolving fund for carrying out the purposes of this contract and not for the general business of the Contractor. Balances in such special account or accounts shall at all times secure the repayment of such advances in connection with which the special account or accounts are opened, and the Government shall have a lien upon such balances to secure the repayment of such advances; which lien shall be superior to any lien of the bank upon such account or accounts by virtue of assignment or otherwise; Provided, however, that any bank in which such funds are deposited shall have no obligation whatever with respect to the use or disposition by the Contractor of funds withdrawn from such account or accounts or be liable for misuse by the Contractor of funds withdrawn prior to the receipt by such bank of notice from the Chief of Ordnance or the order of Court of competent jurisdiction directing it to refrain from permitting withdrawals by the Contractor. The Contracting Officer shall at all times be afforded proper facilities for inspection and audit of such special bank account or accounts.

5. The Contractor may pay to any third party for services in advance or pay for materials or supplies in advance of delivery at the site of the work or at an approved storage site, any of the sums previously advanced to it by the Government under the provisions of this contract, with the prior written approval of the Contracting Officer.

## **Title VI.**

### **Termination.**

#### **Article VI-A—Termination By Government.**

1. The Government may terminate this contract at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor. Upon receipt of such notice, the Contractor shall, unless the notice directs otherwise, immediately discontinue all work and the placing of all orders for materials, facilities, and supplies in connection with performance of this contract and shall proceed to cancel promptly all existing orders and terminate all subcontracts insofar as such orders and subcontracts are chargeable to this contract.

2. If this contract is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises and take possession, for the purpose of completing the work contemplated by this contract, of any or all materials, tools, machinery, equipment, and appliance which may be owned by or in the possession of the Contractor, and all options, privileges, and rights.

and may complete, or employ any other person or persons to complete, said work. Following such termination rental shall be paid to the Contractor for such construction plant or parts thereof as he has own, and which the Government may retain at rates prescribed in Section 2 of Article V-A of Title V.

3. Upon the termination of this contract, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

a. The Government shall assume and become liable for all obligations, commitments, and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and the cost of which would be reimbursable in accordance with the provisions of this contract; and the Contractor shall, as a condition of receiving the payments mentioned in this Title, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

b. The Government shall reimburse the Contractor for all expenditures made in accordance with Title V and not previously reimbursed.

c. The Government shall reimburse the Contractor for such further expenditures, made after the date of termination, for the protection of Government property and for accounting services in connection with the settlement of this contract as are required or approved by the Contracting Officer.



d. The Government shall pay to the Contractor any unpaid balance for the rental of the Contractor's equipment in accordance with Title V to the date of termination.

e. If the contract is terminated for the convenience of the Government, the Contractor will be paid all fees which have accrued at the date of termination, less fee payments previously made. If the contract is terminated due to fault of the Contractor, no additional payment on account of the fixed-fee will be made.

f. The obligation of the Government to make any of the payments required by this Title, or by Title V of this contract, shall be subject to any unsettled claims for labor or material or any claims which the Government may have against the Contractor.

4. Prior to final settlement the Contractor shall, if required furnish a release as required in Section 4 of Article V-B of Title V hereof.

## Title VII.

### General.

#### Article VII-A—Responsibility Of Contractor.

It is the understanding of the parties hereto, and the intention of this contract, that all work under Title IV of this contract is to be performed at the expense of the Government and that the Government shall hold the Contractor harmless against any loss, expense (including expense of litigation), or damage (including liability to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind

whatsoever arising out of or in connection with the performance of the work under such Title IV of this contract, except to the extent that such loss, expense, damage or liability is due to the personal failure on the part of the corporate officers of the Contractor, or of other representatives of the Contractor having supervision or direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

#### Article VII-B—Contingencies.

If the performance of any work under this contract is interrupted or prevented by reason of inability to obtain essential materials to be used in the performance of this contract, or by reason of labor shortage or labor disputes, from whatever cause arising, and whether or not the demands of the employees involved shall be reasonable and within the Contractor's power to concede, or by reason of fire, explosion, or accident, sabotage or any cause beyond its control, whether of a similar or dissimilar nature, the Contractor shall be excused from performing said work while or to the extent that it is prevented from so doing by one or more of such causes, and all such work shall be performed as soon as practicable after such disability is removed. It is further understood and agreed that the Contractor shall be liable for any failure or delays in the performance of Title IV of this contract, and accountable for the loss or destruction of or damage to any materials, tools, machinery, equipment, supplies, semi-finished or finished products or other property or materials located or stored at said Plant or used in connection with the operation thereof, if, and only if and to the extent that, the same is due to the personal failure on the part of the corporate of-

ficers of the Contractor, or of other representatives of the Contractor having supervision or direction of the operation of the Plant as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of the Contractor's business.

#### Article VII-C—Changes

The Contracting Officer may at any time after consultation with the Contractor, by a written order and without notice to the sureties, make changes in or additions to the drawings and specifications, issue additional instructions, require additional work, or direct the omission of work covered by the contract. If such changes cause a material increase or decrease in the amount or character of the work to be done under this contract, or in the time required for its performance, an equitable adjustment of the amount of the fixed-fee to be paid to the Contractor shall be made and the contract shall be modified in writing accordingly; Provided, however, that there shall be no adjustment in the amount of the fixed-fee as provided herein nor shall there be any claim for increased compensation because of any errors and/or omissions made in computing the original estimates of cost hereunder or where the estimated costs vary from the actual costs. Any claim for adjustment under this Article must be asserted within ten (10) days from the date the change is ordered: Provided, however, that the Contracting Officer, if he determines that the facts justify such action may receive and consider, and with the approval of the Chief of Branch, adjust any such claims asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article VII-N hereof, but nothing provided in this Article shall excuse the Con-

tractor from proceeding with the prosecution of the work so changed.

#### Article VII-D--Title.

The title to all work, completed or in the course of construction, preparation or manufacture shall be in the Government. Likewise, upon delivery at the site of the work, at an approved storage site or other place approved by the Contracting Officer and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment and supplies, for which the Contractor shall be entitled to be reimbursed under Title V hereof shall vest in the Government. These provisions as to title being vested in the Government shall not operate to relieve the Contractor from any duties imposed under the terms of this contract.

#### Article VII-E--Materials And Workmanship.

1. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, insofar as they are available, in strict conformity with the best standard practices.

2. Except it be otherwise authorized by the Contracting Officer, all materials shall be of the best quality of their respective kinds. If the Contracting Officer requires that the Contractor submit for prior approval samples of materials proposed for use in the work covered by this contract, the Contractor shall make no commitments for such materials until the submitted samples have been approved by the Contracting Officer.



**Article VII-F—Records And Accounts—Inspection And Audit.**

1. The Contractor agrees to keep records and books of account, on a recognized cost-accounting basis, showing the actual cost to it of all items of labor, materials, equipment, supplies, services, and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and of the special bank account or accounts provided for in Article V-C hereof, and shall at all times have access to the premises, work, and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall, except such original documents as are submitted in support of reimbursement vouchers, preserve for a period of 3 years after completion or termination of this contract, all the books, records, and other papers herein-mentioned.

3. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the Contracting Officer relating to the cost of the work for the purpose of verifying such cost.

4. The Contracting Officer shall have the right to decide which functions of checking and auditing are to be performed exclusively by the Government and to prescribe procedures to be followed by the Contractor in such accounting, checking, and auditing functions as

he may continue to perform. The employment and number of personnel to be engaged by the Contractor for checking, auditing, and accounting work shall be subject to the approval of the Contracting Officer and if, in the opinion of the Contracting Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary.

#### Article VII-G—Special Requirements.

The Contractor hereby agrees that it will:

1. Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approve or require in writing.

2. Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

3. Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of Two Thousand Dollars (\$2,000.00) made by it for the purpose of the work hereunder for services (except contracts of employment), materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchase in excess of

Five Hundred Dollars (\$500.00) shall be made or placed without the approval of the Contracting Officer.

4. Enter into no subcontract for any portion of the work without the written approval of the Contracting Officer. Subcontracts are defined as contracts entered into by the Contractor with others which involve the performance, wholly or in part, at the site of the work, of some part of the work described in Titles I and II hereof.

5. At all times during the progress of the work keep at the site thereof a duly appointed and qualified representative who shall receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer may give under the terms of this contract.

6. The Contracting Officer may require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention is deemed to be not in the public interest, subject however to appeal under the provisions of Article VII-N for reinstatement of such employee.

7. Furnish as required by the Contracting Officer for use in connection with the work, those items of construction equipment and for machinery listed in the record of negotiations as mentioned in Section 2 of Article V-A of Title V, provided that such pieces of equipment and/or machinery shall be furnished, if required, within ten (10) days of the date on which such pieces of equipment and/or machinery are stated to be available. In the event that the Contractor fails to furnish any piece of equipment and/or machinery in accordance with the terms of this provision after the Contracting Officer has

required the furnishing of such piece of equipment and/or machinery the additional cost of obtaining such equipment and/or machinery from any source other than the Contractor shall be paid by the Contractor and shall not be a reimbursable expenditure.

8. At all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government.

#### **Article VII-H—Preference For Domestic Articles.**

In the performance of the work covered by this contractor, subcontractors, materialmen or suppliers, shall use only such unmanufactured articles, materials and supplies as have been mined or produced in the United States, and only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials or supplies of the class or kind to be used or such articles, materials or supplies from which they are manufactured, as are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials or supplies, as may be expected by the Secretary of War under the proviso of Title III, Section 3, of the Act of March 3, 1933: 47 Stat. 1520 (41 U.S.C. 10b).

#### **Article VII-I—Convict Labor.**

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.



**Article VII-J—Workmen's Compensation Laws.**

During the life of this contract the Contractor will provide and maintain for all employees of the Contractor engaged in work under this contract, Workmen's Compensation Insurance or such other protection for employees as may be required by Federal or State statutes in the jurisdiction in which such work is performed, under direction of the Contracting Officer. If the whole or any part of the work under this contract is sublet on a Fixed-Fee basis, the same protection provided for employees of the Contractor will be provided for the protection of the employees of the subcontractors. In those cases where the whole or any part of the work under this contract is sublet on a Lump-Sum basis, the Contractor will require the subcontractor to maintain for their employees Workmen's Compensation Insurance or such other protection for employees as may be required by Federal or State statutes in the jurisdiction in which such work is performed. Prior to commencement of operations under this contract, the Contractor will supply the Contracting Officer with proof of compliance with this Article.

**Article VII-K—Accident Prevention.**

In order to protect the life and health of his employees in the performance of Title I of this contract, the Contractor will comply with all pertinent provisions of the "Safety Requirements For Excavation, Building And Construction, Construction Division, O.Q.M.G.", approved by the Chief of the Construction Division, March 1, 1941, and of the specifications, and will take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for this purpose. The Contractor will maintain an accurate record of, and will report to the Contracting Officer in the

manner and on the forms prescribed by the Contracting Officer, all cases of death, occupational disease, and traumatic injury arising out of or in the course of employment on work under this contract.

#### **Article VII-L—Officials Not To Benefit.**

No Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

#### **Article VII-M—Covenant Against Contingent Fees.**

The Contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from payment due the Contractor the amount of such commission, percentage, brokerage or contingent fee. This warranty shall not apply to commissions payable by Contractor upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

#### **Article VII-N—Disputes.**

Except as otherwise specifically provided herein, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer, subject to written appeal by the Contractor within 30 days to the Chief of Branch concerned or his duly authorized

representative, whose decision shall be final and conclusive upon the parties hereto, when the amount involved is \$50,000.00 or less. When the amount involved is more than \$50,000.00, or when the dispute arises under Section 6 of Article VII-G, or where no specific amount is involved, the decision of the Chief of Branch shall be subject to written appeal within 30 days by the Contractor to the Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the Contractor shall diligently proceed with the work as directed.

#### **Article VII-O—Contractor's Organization And Methods.**

Within a reasonable time after the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the executive and administrative personnel to be regularly assigned for full or part time service in connection with the work under this contract, together with a written statement of their duties and the administrative procedure to be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data becomes available. There shall also be submitted to the Contracting Officer by the Contractor charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers, and laborers to be assigned for full or part time service outside of the central office organization, together with a written statement of their duties and rates of pay, and the procedure proposed to be followed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available. Statements of procedure shall include purchasing,

disbursing, accounting, transportation, storage, employment, housing, sanitation, subsistence, recreation and similar essential activities and methods.

#### **Article VII-P—Assignment Of Claims.**

Neither this contract, nor any interest therein, shall be assigned or transferred by the Contractor to any other party or parties.

#### **Article VII-Q—Loading And Unloading Railway Cars.**

The Constructor shall load promptly all railroad cars furnished for loading upon his order and shall unload from railroad cars promptly upon arrival all shipments consigned to him and shall provide storage facilities and other facilities necessary for these purposes; and the Contractor shall not order railway cars for loading unless they can be loaded promptly and shall not cause or permit shipments to be consigned to him unless they can be unloaded from railroad cars promptly upon arrival.

#### **Article VII-R—Notice To Government Of Labor Disputes.**

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of Title I of this contract, the Constructor will immediately give notice thereof to the Chief of the Construction Division, O.Q.M.G. Such notice shall include all relevant information with respect to such dispute.

#### **Article VII-S—Approval Required.**

This contract shall be subject to the written approval of the Secretary of War and shall not be binding until so approved.



### Article VII-T—Statutory Provisions.

It is understood that the respective undertakings to conform to the requirements of the several statutes hereinbefore referred to shall be operative only so long as and to the extent that such statutory requirements are applicable hereunder.

### Article VII-U—Definitions.

1. The term "Chief of Branch" refers to the Chief of Ordnance or The Quartermaster General.

2. The terms "Secretary of War" or "Chief of Branch" shall include their duly authorized representatives as the case may be other than the Contracting Officer.

3. For the original signing of this contract, the term "Contracting Officer" as used herein shall be deemed to include the Contracting Officer appointed by The Quartermaster General and the Contracting Officer appointed by the Chief of Ordnance.

4. The term "Contracting Officer" when used in connection with the supervision of performance of construction work of the entire project, and in connection with the supervision of preparation of detailed plans and working drawings for roads, railroads, sewage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance, refers to the Contracting Officer appointed by the Quartermaster General, or to his successor or duly authorized representative; and when used in connection with any other phase of the work to be per-

formed under this contract it refers to the Contracting Officer appointed by the Chief of Ordnance, or to his successor or duly authorized representative.

#### Article VII-V—Racial Discrimination.

The Contractor, in performing the work required by this contract, shall not discriminate against any worker because of race, creed, color or national origin.

#### Article VII-W—Alterations.

The following alterations were made in this contract before it was signed by the parties hereto:

On page 26, section (b) of paragraph 1, Article I-A of Title I was changed from "2,400 Rounds" to "8,400 Rounds".

On page 74, Article VII-F of Title VII following paragraph 3 add the following as paragraph 4:

"4. The Contracting Officer shall have the right to decide which functions of checking and auditing are to be performed exclusively by the Government and to prescribe procedures to be followed by the Contractor in such accounting, checking, and auditing functions as he may continue to perform. The employment and number of personnel to be engaged by the Contractor for checking, auditing, and accounting work shall be subject to the approval of the Contracting Officer, and, if in the opinion of the Contracting Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary."

In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

**THE UNITED STATES OF  
AMERICA.**

By (Sgd.) **L. H. CAMPBELL, JR.,**  
(L. H. Campbell, Jr.),  
Brig. Gen., U. S. Army,  
(Contracting Officer appointed by Chief of Ordnance).

By (Sgd.) **HOMER W. JONES,**  
(Homer W. Jones),  
Lieut. Col., J.A.G.D.,  
(Contracting Officer appointed by The Quartermaster General).

Approval recommended:

July 7, 1941.

(Sgd.) **C. M. WESSON,**  
(C. M. Wesson),  
Major General,  
Chief of Ordnance.

**SILAS MASON COMPANY,**  
(Contractor).

Approval recommended:

July 8, 1941.

(Sgd.) **E. B. GREGORY,**  
(E. B. Gregory),  
Major General,  
The Quartermaster General.

By (Sgd.) **H. L. MYER,**  
Vice President,  
500 5th Ave., N. Y. City,  
(Business Address).

Two Witnesses as to Execution, by the Contractor:  
(Address).

(Sgd.) ARNOLD HANGER,  
500 5th Ave.,  
(Address) New York.

(Sgd.) FRANCIS DONALDSON,  
Tuckahoe, N. Y.

Approved July 10, 1941, by direction of the Secretary  
of War.

(Sgd.) ROBERT P. PATTERSON,  
(Robert P. Patterson),  
Under Secretary of War.

I, H. M. Collins, certify that I am the Assistant Secretary of the corporation named as Contractor herein; that H. L. Myer who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

.....  
(Sgd.) H. M. COLLINS,  
Asst. Secretary.

(Corporate Seal)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, H. L. Myer who signed this contract for the Silas Mason Company had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

(Sgd.) L. H. CAMPBELL, JR.,  
(L. H. Campbell, Jr.),  
Brig. Gen., U. S. Army.

①



Approved: April 13, 1942.

(Sgd.) C. M. WESSON,  
(C. M. Wesson), CTH  
Major General,  
Chief of Ordnance.

Approved: Apr. 15, 1942,

(Sgd.) E. REYBOLD,  
(Eugene Reybold),  
Major General,  
Chief of Engineers.

Contract No. W-ORD-517 DA-W-ORD-4 Supp. 1.

Supplemental Contract  
to

Cost-Plus-a-Fixed-Fee

New Ordnance Facility.

Construction and Operation Contract.

War Department.

Contractor: Silas Mason Company, New York, N. Y.

Contractor for: Supplemental contract to modify terms of the original contract to include stipulations regarding race discrimination, payment for telegraph charges, provision, excluding subrogation, title to materials, etc., storage of materials, etc., and definitions.

Place: At or near Minden, Louisiana.

Payments to be made by Finance Officer, U. S. Army at New Orleans, Louisiana.

This contract is authorized by the Act of July 2, 1940, (Public No. 703, 76th Cong.) and the act approved December 18, 1941 (Public Law 354—77th Cong.) and Executive 42-4571 Order No. 9001 dated December 27, 1941.

(Sgd.) J. B. ROSE,

(J. B. Rose),

Brig. Gen., Ord. Dept.

### Supplemental Contract.

This Supplemental Contract, entered into this 11th day of April, 1942, by The United States of America (hereinafter referred to as "the Government"), represented by the Contracting Officers executing this contract, and Silas Mason Company, a corporation organized and existing under the laws of the State of Delaware; of the city of New York, in the State of New York, Witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract identified by the Government as Contract No. W-ORD-517 DA-W-ORD-4 and being hereinafter sometimes referred to as the "original contract"; and

Whereas, the Under Secretary of War has from time to time issued directives for the modification of existing contracts to include certain matters; and

Whereas, the Government now desires to modify said original contract so as to provide certain stipulations regarding racial discrimination, payment for telegraph charges, provision excluding subrogation, title to materials, etc., storage of materials, etc., and definitions; and

Whereas, the Contractor has agreed to such modification upon the terms, conditions, and provisions hereinafter set out; and

Whereas, as a result of negotiations, the Secretary of War has directed that the Government enter into a supplemental contract with the Contractor, for the accomplishment of the above described changes;

Now, Therefore, the parties hereto do mutually agree that the said original contract shall be and it is hereby modified in the following particulars:

A. Change Section 6 of Article IV-A of Title IV to read:

(a) The Government shall furnish all explosives, including neutral nitrate of ammonia solution for the manufacture of nitrate of ammonia, and all metal parts for the loading of the Ammunition, including shipping materials and containers when and as requisitioned from time to time by the Contractor, to be delivered when required, f. o. b. said Plant, in sufficient quantities to enable the Contractor to carry on the operation of the Plant provided for in this Title IV.

(b) The Contractor shall accept, handle and store, within the storage capacity of the Plant not immediately necessary for use in connection with the operation of the Plant, such materials and explosives as it may be directed from time to time by the Contracting Officer; provided, that the Government shall remove or cause to be removed any material or explosives so stored whenever the storage capacity so utilized becomes necessary to the operation of the Plant; and provided, further, that the Contractor shall be under no obligation to accept or store or permit to be stored at said Plant, any explosives which would render the work to be done by the Contractor hereunder hazardous beyond what is usual in the normal operation of a Plant of the type provided for herein.

**B. Change Section 5 of Article V-A of Title V to read:**

The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges. The Government will pay direct for all telegrams, telephone communications (including teletype and facsimile when authorized by the Contracting Officer to be installed), cablegrams, radiograms, and similar messages that may be sent by the Contractor pertaining directly to the contract for work to be done or materials to be furnished thereunder, and the Contractor is hereby designated as an agent of the Government for the purpose of causing the transmittal of any such messages.

**C. Change Article VII-D of Title VII to read:**

Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to reimbursement under this contract shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment, and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time.

**D. Change Section 1 of Article VII-G of Title VII to read:**

1. Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such



bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer may approve or require in writing. Such bond or insurance policy shall contain an indorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States.

**E. Change Article VII-V of Title VII to read:**

1. The Contractor in performing the work required by this contract shall not discriminate against any worker because of race, creed, color or national origin.

2. The Contractor agrees that subparagraph 1 above will be inserted in all its subcontracts. For the purpose of this article, a subcontract is defined as any contract entered into by the Contractor with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles of raw material shall not be considered as a subcontract.

**F. Change Article VII-U of Title VII to read:**

1. The term "Chief of Branch" refers to the Chief of Ordnance, or The Chief of Engineers.

2. The terms "Secretary of War" or "Chief of Branch" shall include their duly authorized representatives as the case may be other than the Contracting Officer.

3. For the original signing of this contract, or any modification hereof, the term "Contracting Officer" as used herein shall be deemed to include the Contracting Officer in the Office of The Chief of Engineers appointed for that purpose by The Chief of Engineers and the Contracting Officer appointed by the Chief of Ordnance. For all other purposes the term "Contracting Officer" shall mean the District Engineer of the United States Engineer District in which the contract work is being performed, his successor or duly authorized representative; or the Contracting Officer appointed by the Chief of Ordnance, his successor, or duly authorized representative.

4. The term "Contracting Officer" when used in connection with the approval of performance of construction work of the entire project, and in connection with the approval of preparation of detailed plans and working drawings for roads, railroads, sewage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings, such as offices, general warehouses and garages, and such miscellaneous construction as may be requested by the Chief of Ordnance, refers to the District Engineer of the United States Engineer District in which the Contract work is being performed, his successor or duly authorized representative; and when used in connection with any other phase of the work to be performed under this contract the term "Contracting Officer" refers to the Contracting Officer appointed by the Chief of Ordnance, to his successor or duly authorized representative.

G. Except as herein provided, the terms and conditions of the original contract as heretofore modified shall continue in full force and effect and shall apply with equal force to this supplemental agreement.

H. This supplemental contract shall be subject to the written approval of the Chief of Ordnance and The Chief of Engineers and shall not be binding until so approved.

I. The following alterations were made in this supplemental contract before it was signed by the parties hereto:

None.

In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF  
AMERICA.

By (Sgd.) J. B. ROSE,  
(J. B. Rose),  
Brig. Gen., Ord. Dept.,  
(Contracting Officer appointed by The Chief of Ordnance).

By (Sgd.) C. E. STRAIGHT,  
(C. E. Straight),  
Major, J.A.G.D.,  
(Contracting Officer appointed by The Chief of Engineers).

SILAS MASON COMPANY,  
(Contractor).

By (Sgd.) H. L. MYER,  
Vice Pres.,  
Box 1162, Shreveport, La.,  
(Business Address),  
Louisiana Ordnance Plant.

Two Witnesses as to Execution by the Contractor:

(Sgd.) R. L. TELFORD,

Box 1162, Shreveport, La.,

(Address),

La. Ordnance Plant.

(Sgd.) P. L. WILSON,

Box 1162, Shreveport, La.,

Louisiana Ordnance Plant,

(Address).

I, C. L. Taylor, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that H. L. Myer who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Sgd.) C. L. TAYLOR.

(Corporate Seal).

Date May 5, 1943.

Change Order No. 2, Contract No. W-ORD-517 DA-W-ORD-4, as Amended.

Due to change in identification system of modifications to Contracts this Change Order is numbered 2, there being in existence Supplement 1.



War Department—Ordnance Department.

Change Order  
to  
Cost-Plus-a-Fixed-Fee.

New Ordnance Facility.

Construction and Operation Contract.

Contractor: Silas Mason Company, New York City,  
New York.

Name and Location of Plant: Louisiana Ordnance Plant  
near Minden, Louisiana.

1. Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, the following additional instructions are hereby issued:

2. The Contractor shall, as directed by the Contracting Officer's Representative:

a. Repair construction equipment for the Corps of Engineers; provided, however, that such repair work to be done does not necessitate substantial additional tooling up (other than the purchase of necessary perishable tools) or the purchase by the Contractor of any additional machines or equipment; provided, further, that such repair work provided for hereunder shall be performed at such times only when the capacity of the machine shop, which is to be used in the performance of such repair work, is not being utilized in the work of the Louisiana Ordnance Plant. The work of the Louisiana Ordnance Plant shall at all times have priority over the

repair work to be done on construction equipment for the Corps of Engineers. All repair work for the Corps of Engineers on construction equipment shall be performed under an agreement that all risk of loss due to damage done by accident or otherwise shall be borne by the Corps of Engineers. All work done and materials or parts furnished in connection with any repairs hereunder to the construction equipment of the Corps of Engineers shall be performed and furnished at cost. The receipts from such work performed and materials furnished in the repair of such construction equipment shall be applied in reduction of the cost of the work of the Plant. The Contractor will be reimbursed for all of its expenditures in connection with wages paid and materials used in the performance of the work provided for herein, in accordance with the provisions of Article V-A of Title V of Contract No. W-ORD-517 DA-W-ORD-4, as amended.

b. Transport or cause to be transported, by subcontract or otherwise, any of the products of said Plant in accordance with the directions of the Contracting Officer, to such points within the continental United States as may be designated. The Contractor shall be reimbursed for its expenditures in performance of the work required under this paragraph in accordance with the provisions of Article V-A of Title V of Contract No. W-ORD-517 DA-W-ORD-4, as amended.

3. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract No. W-ORD-517 DA-W-ORD-4, as amended.

4. There is no change in the estimated cost of the Contractor's services under said Contract and no change

is made in the fixed-fee. No change in the time required for performance involved.

5. Except as hereby changed, the terms and conditions of the Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 2:

THE UNITED STATES OF  
AMERICA.

(Sgd.) OTTO M. JANK,

(Otto M. Jank),

Colonel, Ord. Dept., JJMcI  
Contracting Officer.

Receipt is hereby acknowledged of the above Change Order No. 2 to Contract No. W-ORD-517 DA-W-ORD-4, dated March 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date 7/5, 1943.

SILAS MASON COMPANY,

(Seal)

(Contractor).

By (Sgd.) R. L. TELFORD,  
Vice Pres.

McInerney/111 Change Order 3 to Contract W-ORD-517  
DA-W-ORD-4, as amended May 26, 1943.

Due to change in identification system of modifications to Contracts this Change Order is numbered 3, there being in existence 1 Supplement and Change Order No. 2.

War. Department—Ordnance Department.

Change Order  
to  
Cost-Plus-a-Fixed-Fee.

Construction and Operation Contract.

Contractor: Silas Mason Company, New York, New York.

Name and Location of Plant: Louisiana Ordnance Plant, Minden, Louisiana.

1. Pursuant to the provisions of Article VII-C of Title VII, Contract W-ORD-517 DA-W-ORD-4, as amended, the following instructions are hereby issued:

Anything in Contract W-ORD-517 DA-W-ORD-4, as amended; to the contrary notwithstanding, unless otherwise directed or authorized by the Contracting Officer, all drawings required to be furnished by the Contractor will be prepared in pencil on tracing paper or pencil tracing cloth of approved quality by such methods and of such quality of workmanship as will permit the revision of such drawings for record purposes and the making of satisfactory reproductions thereof. Drawings shall be prepared in ink on linen only where satisfactory results cannot be obtained otherwise.

2. This Change Order involves no appreciable increase or decrease in the estimated cost of the work under said Contract and no increase or decrease in the fixed-fees thereunder will be made. No appreciable change in the time required for performance is involved.



3. Except as hereby changed all the terms and conditions of Contract W-ORD-517 DA-W-ORD-4, as amended, shall remain in full force and effect and shall also apply in carrying out the provisions of this Change Order No. 3.

**THE UNITED STATES OF  
AMERICA.**

(Sgd.) **RAYMOND REBSAMEN,**  
(Raymond Rebsamen),  
Major, Ord. Dept.,  
Executive Officer, JJMcI  
Field Director Ammunition  
Plants,  
(Contracting Officer  
appointed by the Chief  
of Ordnance).

(Sgd.) **O. P. EASTERWOOD, JR.,**  
(O. P. Easterwood, Jr.),  
Major, C. of E.,  
(Contracting Officer ap-  
pointed by the Chief of  
Engineers).

Receipt is hereby acknowledged of the above Change Order No. 3 to Contract No. W-ORD-517 DA-W-ORD-4, as amended, dated July 3, 1941, and the Contractor hereby accepts the terms and conditions thereof.

Date June 10, 1943.

**SILAS MASON COMPANY,**  
(Contractor).

By (Sgd.) **JOHN J. WATTS,**  
Vice Pres.

**Negotiated Contract.**

**Contract No. W-ORD-517, DA-W-ORD-4, Supplement 4,**

**Supplemental Contract**

**Cost-Plus-a-Fixed-Fee.**

**New Ordnance Facility**

**Construction and Operation Contract.**

**War Department.**

**Contractor: Silas Mason Company.**

**Supplemental Contract for: Clarifying the intention of the parties with respect to certain provisions of the contract pertaining to payment of wages.**

**Place: At or near Minden, Louisiana.**

**Payments to be made by Finance Officer, U. S. Army, at New Orleans, Louisiana.**

**The equipment, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:**

**ORD 9762 P99 A0141-02**

**ORD 9763 P99 A0141-02**

**ORD 22578 P120 A1005-23**

Approval recommended:

July 12, 1943.

L. H. CAMPBELL, JR.,

† Major General,

Chief of Ordnance, VCR.

By (Sgd.) E. P. RUSSELL,

(E. P. Russell),

Lt. Col., Ord. Dept.

Approval recommended:

....., 1943.

E. REYBOLD,

Major General,

Chief of Engineers.

Approval recommended:

(Sgd.) C. L. STURDEVANT,

(C. L. Sturdevant),

Brigadier General,

Acting Chief of Engineers.

Approved August 3, 1943.

(Sgd.) PHILLIPS W. SMITH,

(Phillips W. Smith),

Lt. Col., G.S.C.,

Deputy Director, Purchases Division.

This Supplement Contract is authorized by the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.) as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended, the Act approved December 18, 1941 (Public Law 354, 77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

(Sgd.) RAYMOND REBSAMEN,

(Raymond Rebsamen),

Lt. Col., Ord. Dept., Execu-

tive Officer, Field Direc-

tor of Ammunition Plants,

Contracting Officer.

## Supplemental Contract.

This Supplemental Agreement, entered into this 6th day of July, 1943, by and between the United States of America (hereinafter referred to as the "Government"), represented by the Contracting Officer executing this Supplemental Agreement and Silas Mason Company (hereinafter referred to as the "Contractor"),

Witnesseth That:

Whereas, there is now in full force and effect between the parties hereto a certain contract providing for the designing, constructing and equipping, and at the option of the Government, training of key personnel, and operation of a new ordnance facility at or near Minden, Louisiana, bearing date of July 3, 1941 and being identified as Contract No. W-ORD-517 DA-W-ORD-4 (hereinafter referred to as the "principal contract"); and

Whereas, said Principal Contract has been amended by Supplemental Contract dated April 11, 1942, identified by the Government as Contract No. W-ORD-517 DA-W-ORD-4, Supplement 1, and by Change Orders No. 2 and 3, dated May 5, 1943, and May 26, 1943, respectively; and

Whereas, said principal contract provides in Article I-F, Section 2 as follows:

"2. Should the Contractor or any subcontractor pay to any laborer or mechanic a wage based upon a rate in excess of the wage rate for the classification in which said laborer or mechanic is included as established for the work by the Secretary of Labor, such increased wage shall be at the expense of the Contractor and shall not



be reimbursed by the United States. When, in connection with the audit and check by the Contracting Officer or his authorized representative, of the Contractor's payrolls, prior to reimbursement as contemplated in Section 1 of Article I-D hereof, it is found that one or more laborers and/or mechanics have been paid wages at rates in excess of the wage rates, established for such laborers and/or mechanics, the reimbursement made to the Contractor on account of such pay rolls will not include such excess payments. The provisions of this Section shall not apply when wage rates for a particular classification greater than those prescribed by the Secretary of Labor have been approved in writing by the Contracting Officer.";

and

Whereas, said paragraph was designed and incorporated in said Principal Contract for the express purpose of limiting wages of employees under the direct supervision of the Contractor; and of those employees under subcontracts whose wages were reimbursable as such, as in the case of cost-plus-a-fixed-fee subcontracts; and

Whereas, said provision was in no way intended to be applicable to or affect employees under Lump Sum or Unit Price contracts awarded under said Principal Contract; and

Whereas, it is desired to clarify said Principal Contract so as to more clearly set forth the aforesaid understanding; and

Whereas, the Secretary of War is authorized by the First War Powers Act, 1941, and Executive Order No. 9001, within the limits of the amounts appropriated there-

for, to enter into amendments or modifications of contracts, and by agreement to modify or amend or settle claims under contracts, whenever in his judgment the prosecution of the war is thereby facilitated; and

Whereas, it has been determined by the Secretary of War that in his judgment the prosecution of the War will be facilitated by the modification of the Principal Contract as hereinafter set out.

Now, Therefore, the parties do hereby mutually agree that said Principal Contract shall be and the same is hereby amended in the following manner:

1. Delete Paragraph a. of Section 2, Article 1-F and insert in lieu thereof the following:

"a. All wage rates, including compensation for overtime for laborers and mechanics engaged in work under this contract shall be approved in writing by the Chief of the Supply Service or a representative expressly designated by him for that purpose, and any amount paid by the Contractor to any laborer or mechanic in excess of the wage rate approved for such laborer or mechanic by the Chief of the Supply Service or a representative expressly designated by him for that purpose shall be at the expense of the Contractor and shall not be reimbursed by the Government. When, in connection with the audit and check by the Contracting Officer or his authorized representative, of the Contractor's pay rolls prior to reimbursement as contemplated in Section 1 of Article I-D hereof, it is found that one or more laborers and/or mechanics have been paid wages at rates in excess of the wage rates approved as herein provided, the reimbursement made to the Contractor on account of such pay rolls will not include any such excess payments."

\*2. It is hereby understood and agreed that the foregoing modification shall, in addition to being considered

effective subsequent to the date of this instrument, be considered applicable retroactively to the date of the Principal Contract.

3. This Supplemental Agreement shall be subject to the approval of the Secretary of War or his duly authorized representative, and shall not be binding unless so approved.

4. Said Principal Contract, as modified and amended, shall be and remain in full force and effect.

In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF  
AMERICA.

By (Sgd.) RAYMOND REBSAMEN,  
(Raymond Rebsamen),  
Lt. Col., Ord. Dept., JJMcI  
Executive Officer, Field  
Director of Ammunition  
Plants,  
(Contracting Officer appointed by The Chief of Ordnance).

By (Sgd.) Q. P. EASTERWOOD, JR.,  
(Q. P. Easterwood, Jr.),  
Major, Corps of Engineers,  
(Contracting Officer appointed by The Chief of Engineers).

SILAS MASON COMPANY,  
(Contractor).

By (Sgd.) R. L. TELFORD,  
Vice Pres.,  
Box 1162, Shreveport,  
(Business Address).

Two Witnesses as to Execution by the Contractor:

(Sgd.) RUTH J. MacLEAD,  
Box 1162, Shreveport, La.,  
(Address).

(Sgd.) KATHARINE MORELAND,  
Box 1162, Shreveport,  
(Address).

I, C. L. Taylor, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that R. L. Telford who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Sgd.) C. L. TAYLOR,

(C. L. Taylor),

Asst. Secretary, Silas Mason  
Company.

(Corporate Seal)

Due to change in identification system of modifications to contracts this Change Order is numbered 5, there being in existence Supplements 1 and 4, and Change Orders 2 and 3.

Parsons/nl.

Date: October 4, 1943.

Change Order No. 5.

Contract No. W-ORD-517 DA-W-ORD-4, as Amended.



**War Department—Ordnance Department.****Change Order  
to  
Cost-Plus-A-Fixed-Fee  
New Ordnance Facility  
Construction and Operation Contract.**

**Contractor:** Silas Mason Company, New York, New York.

**Name and Location of Plant:** Louisiana Ordnance Plant, Minden, Louisiana.

1. Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, the following additional instructions are hereby issued:

a. You are hereby authorized and directed, with the approval of the Contracting Officer, to do all things necessary or incident to operating the Ammonia Nitrate Crystallizing facilities of the Plant to crystalize Ammonium Nitrate solution, and to coat same in accordance with the process hereby referred to as the Tennessee Valley Authority process, including, without limiting the generality of the foregoing, the reworking and coating of Ammonium Nitrate now in storage, the training of personnel incident thereto at Tennessee Valley Authority's plant or elsewhere, and the loading of same on cars in bags ready for shipment.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract W-ORD-517 DA-W-ORD-4, as amended.

3. There is an appreciable change in the estimated cost of the Contractor's services under said Contract but no change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 5.

**THE UNITED STATES OF  
AMERICA,**

(Sgd.) By **RAYMOND REBSAMEN,**  
(Raymond Rebasmen)

Lt. Col., Ord. Dept., Execu-  
tive Officer, Field Direc-  
tor Ammunition Plant.  
(Contracting Officer ap-  
pointed by the Chief of  
Ordnance.)

JJMcl

Receipt is hereby acknowledged of the above Change Order No. 5 to Contract W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: Oct. 12th, 1943.

**SILAS MASON COMPANY,**  
(Contractor)

(Seal)

(Sgd.) By **R. L. TELFORD,**  
Vice President.

Due to change in identification system of modifica-  
tions this Supplement is numbered 6, there being in ex-

istence Supplements 1 and 4 and Change Orders 2, 3 and 5.

Contract No. W-ORD-517 DA-W-ORD-4.

Supplement 6.

Approved: Dec. 2, 1943.

L. H. CAMPBELL, JR., VCR

Major General, Chief of Ordnance.

(Sgd.) By E. P. RUSSELL,

(E. P. Russel)

Lt. Col., Ord. Dept.

Cost-Plus-A-Fixed-Fee

New Ordnance Facility

Construction and Operation Contract.

War Department.

Contractor: Silas Mason Company.

Place: At or near Minden, Louisiana.

Supplemental Contract for: Authorizing the disposition of property and the modification of subcontracts and purchase orders; and modification of provisions pertaining to fixed-fee, Walsh-Healey Act, transportation, communications, travel, overhead expense, termination, insurance, renegotiation, convict labor, disputes, definitions, labor disputes and anti-discrimination.

This Supplement makes no change in estimated costs, but reduces fixed-fees under Title IV for second year's operation from \$420,000 to \$370,000.

Payments to be made by Finance Officer, U. S. Army at New Orleans, Louisiana.

The new ordnance facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

- 5-9762 P210 A210/40141.
- 5-9763 P210 A210/40141.
- 5-50179 P510 A21-111/40025.
- 5-50180 P531 A21-111/40025.
- 5-22578 P120 A212/41005.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940; (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended, the Act approved December 18, 1941 (Public Law 354, 77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

(Sgd.) CARROLL D. HUDSON,

(Carroll D. Hudson)

Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants, Contracting Officer.

• Supplemental Contract.

This Supplemental Contract, entered into this 15th day of October, 1943, by The United States of America, here-



inafter called "the Government", represented by the Contracting Officers executing this contract, and Silas Mason Company, a corporation organized and existing under the laws of the State of Delaware, of the city of New York, in the State of New York, hereinafter called "the Contractor", Witnesseth That:

Whereas, there is now in force between the parties hereto a certain contract dated July 3, 1941, identified by the Government as Contract No. W-ORD-517 DA-W-ORD-4 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, said Original Contract has been amended by Supplemental Contracts dated April 11, 1942 and July 6, 1943 which Supplemental Contracts are identified by the Government as Contract No. W-ORD-517 DA-W-ORD-4-Supplements 1 and 2, respectively, and by Change Orders No. 2, 3 and 5 dated May 5, 1943, May 26, 1943 and October 4, 1943, respectively; and

Whereas, the Original Contract has been so construed as not to carry out the original intent of the Contracting parties with respect to travel and subsistence of the Contractor's employees, with the result that the Contractor is not being paid those amounts which the Contracting parties intended and agreed would be paid; and

Whereas, the modification of the Original Contract, as amended, clarifying and restating the original intentions of the Contracting parties, made retroactive to the date of the Original Contract, will facilitate the prosecution of the war, and is pursuant to the provisions of the First War Powers Act of 1941, and Executive Order 9001; and

Whereas, the Government also desires to so modify the Original Contract, as amended, to incorporate the

terms of Change Orders 2, 3, and 5; to authorize the disposition of property and the modification of subcontracts and purchase orders; and to modify the clauses relating to fixed-fee, Walsh-Healey Act, transportation, communications, overhead expense, termination, insurance, renegotiation, convict labor, disputes, definitions, labor disputes, and anti-discrimination; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions hereinafter set out; and

Whereas, the accomplishment of the above described work and modifications under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the above described work; and

Whereas, it has been administratively determined that the foregoing will facilitate the prosecution of the war;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

A. Section 1 of Article I-A of Title I is changed by adding at the end thereof the following:

The Contractor is authorized and shall, in accordance with the instructions of the Contracting Officer, load or reenvate at the Plant any Ammunition whether or not

specifically mentioned herein, in such quantities as may be directed by the Contracting Officer; Provided, however, that the Contractor shall not be obligated to load or renovate any types or quantities of ammunition which the facilities of said Plant may not be capable of loading or renovating.

B. Paragraph g. of Section 1 of Article I-E of Title I. is changed to read:

g. When preliminary drawings are approved by the Contracting Officer, prepare final designs, detailed working drawings and specifications in accordance with Government standards necessary for the effective coordination and efficient execution of the construction work and revise the drawings and specifications as required by the Contracting Officer. Unless otherwise directed or authorized by the Contracting Officer all drawings required to be furnished by the Contractor will be prepared in pencil on tracing cloth of approved quality by such methods and of such quality of workmanship as will permit the revision of such drawings for record purposes and the making of satisfactory reproductions thereof. Drawings shall be prepared in ink on linen only where satisfactory results cannot be obtained otherwise. The specifications shall be mimeographed to produce the number of copies required by the Contracting Officer. There shall be included in the specifications all provisions which the Contracting Officer may direct to have incorporated therein relating to the advertising, negotiating, awarding of contract, conditions under which the work shall be done, and any special provisions required by statute or existing War Department regulations or instructions.

C. Section 7 of Article IV-A of Title IV is changed to read:

7. a. In carrying out the work under this Title IV the Contractor is authorized to and shall do all things necessary or convenient in the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor), the providing of all materials and supplies except such as the Government is to furnish or supply as elsewhere specifically provided herein, the storage of materials and supplies and of the finished products to the extent of the storage facilities at said Plant, the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions.

b. The Contractor shall, as directed by the Contracting Officer's Representative, repair construction equipment for the Corps of Engineers; provided, however, that such repair work to be done does not necessitate substantial additional tooling up (other than the purchase of necessary perishable tools) or the purchase by the Contractor of any additional machines or equipment; provided, further, that such repair work provided for hereunder shall be performed at such time only when the capacity of the machine shop, which is to be used in the performance of such repair work, is not being utilized in the work of the Plant. The work of the Plant shall at all times have priority over the repair work to be done on construction equipment for the Corps of Engineers. All repair work for the Corps of Engineers on construction equipment shall be performed under an agreement that all risk of loss due to damage done by



accident or otherwise shall be borne by the Corps of Engineers. All work done and materials or parts furnished in connection with any repairs hereunder to the construction equipment of the Corps of Engineers shall be performed and furnished at cost insofar as is practicable to determine cost. The receipts from such work performed and materials furnished in the repair of such construction equipment shall be applied in reduction of the cost of the work under this contract.

c. The Contractor shall, as directed by the Contracting Officer's Representative, transport or cause to be transported, by subcontract or otherwise, any of the products of said Plant to such points within the continental United States as may be designated.

d. It is recognized that property (including without limitation machine tools and processing equipment, manufacturing aids, raw, manufactured, scrap and waste materials), title to which is or may hereafter become vested in the Government, will be used by or will be in the care, custody or possession of the Contractor in connection with the performance of this contract. With the approval in writing of the Contracting Officer (whether such approval is given prior to or after the giving of a notice of the termination of this contract for the convenience of the Government), the Contractor may transfer or otherwise dispose of such Government-owned property to such parties and upon such terms and conditions as the Contracting Officer may approve or ratify, or, with like approval by the Contracting Officer, the Contractor may itself acquire title to such property or any of it at a price mutually agreeable. The proceeds of any such transfer or disposition or the agreed price of any property, title to which is so acquired by the Contractor, shall be applied in reduction of any payments to

be made by the Government to the Contractor under this contract, or shall otherwise be paid in such manner as the Contracting Officer may direct.

e. With the approval of the Contracting Officer, the Contractor may modify a subcontract or purchase order under this contract to increase the price or extend more favorable terms to the subcontractor.

f. The Contractor shall, from time to time with the approval of the Contracting Officer, do all things necessary or incident to operating the Ammonia Nitrate Crystallizing facilities of the Plant to crystallize Ammonium Nitrate solution, and to coat same in accordance with the process hereby referred to as the Tennessee Valley Authority process, including, without limiting the generality of the foregoing, the reworking and coating of Ammonium Nitrate now in storage, the training of personnel incident thereto at Tennessee Valley Authority's plant or elsewhere, and the loading of same on cars in bags ready for shipment. Nothing in this paragraph f. shall be construed as requiring the Contractor to operate said Ammonium Nitrate facilities beyond the period the Contractor is operating the Plant.

D. Section 3 of Article IV-C of Title IV is changed to read:

3. A fixed-fee for continued operation provided in Section 4 of Article IV-A hereof, as follows: Three Hundred Seventy Thousand Dollars (\$370,000.00) for twelve (12) months operation, (June 8, 1943 through June 7, 1944) which fee shall constitute complete compensation for Contractor's services during continued operation, including profit, other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

E. Article IV-D of Title IV is changed to read:

**Article IV-D—Walsh-Healey Act.**

The representations and stipulations required by Section 1 of the Act of June 30, 1936 (Walsh-Healey Act, Public 846, 74th Congress) to be included in all contracts therein specified, shall apply to the operation of the Plant under this contract and are hereby incorporated and made a part of this contract for that purpose with the same force and effect as if fully set forth in this contract, subject to all applicable regulations, determinations, and exemptions of the Secretary of Labor now or hereafter in effect.

F. The title to Article V-A of Title V is changed to read:

**Article V-A—Reimbursement for Contractor's Expenditures and Payment of Predetermined Fixed Amounts.**

Q. The initial paragraph of Section 1 of Article V-A of Title V is changed to read:

1. The Contractor shall be reimbursed in the manner hereinafter described for such of its actual expenditures in the performance of the work under this contract, and paid the predetermined fixed amounts, as may be approved or ratified by the Contracting Officer, and as are included in but not limited to the following items:

H. Paragraph c. of Section 1 of Article V-A of Title V is changed to read:

c. Transportation, loading, unloading, and storage charges on materials, supplies, and equipment, including

expenses of removing rejected property under Article VII-D of Title VII hereof.

I. Paragraph d. of Section 1 of Article V-A/ of Title V. is changed to read:

d. (1) Transportation and Pullman and/or other transportation accommodation expenses of employees, (including officers) of the Contractor, as are actually incurred in connection with such work.

Reimbursement to the Contractor for such transportation and Pullman and/or other transportation accommodation expenses shall be limited to the costs as borne by the Contractor. Transportation by automobile on such required travel shall be reimbursed at the rate of Five Cents (\$.05) per mile as representing the actual cost of such transportation.

(2) The Contractor will, in addition to the reimbursement for transportation and Pullman and/or other transportation accommodation expenses provided for above, be paid as a predetermined fixed amount, and not by way of reimbursement, Six Dollars (\$6.00) per day, or for a fractional part thereof, per man in travel status of lieu of all other expenses pertaining to subsistence of such employees (including officers). The said sum of Six Dollars (\$6.00) has been predetermined by the Contracting Officer, as representative of the average proportionate share of the Contractor's subsistence costs applicable to the performance of the contract.

(3) Costs and expenses reimbursed to employees of the Contractor transferred to or from the Plant on account of transportation of themselves, their families and their household goods.



(4) All travel shall be either authorized or approved in writing by the Contracting Officer. Should the Contractor or any representative thereof remain in a travel status, in excess of six (6) days at any one time not including the time consumed in travel, the cost for such excess travel status shall be at the expense of the Contractor, unless otherwise ordered in writing by the Contracting Officer.

J. Paragraph p. of Section 1 of Article V-A of Title V is changed to read:

p. 1. The fixed amount of One Thousand Dollars (\$1,000.00) per month for each calendar month of operation, payable at the close thereof, subsequent to the commencement of the complete operation provided in Section 3 of Article IV-A of Title IV, as complete compensation, including all general overhead, for all services performed by the Contractor at its New York, N. Y. offices in connection with the work under Title IV hereof during the period this paragraph 1 is operative, except for the wages, salaries and transportation and traveling expenses of employees of the Contractor who devote full time to the work under such Title IV. The initial amount shall be payable at the close of the calendar month during which sum operation commences. Provided, however, that this paragraph shall become inoperative on June 8, 1943 and no payments shall accrue hereunder thereafter.

2. For the purposes of this paragraph p. of this Section 1 of Article V-A, the term "full time" shall be deemed, during the period paragraphs 1 and 2 of this paragraph p. are both operative, to refer to the time of employment of those employees engaged solely upon the work under this contract and who are carried on pay-

rolls separate from the Contractor's payrolls relating to its other business and not to employees of the Contractor engaged part time on the work under this contract and part time on the Contractor's other business.

K. Paragraph w. is added to Section 1 of Article V-A of Title V to read:

w. Payments made pursuant to paragraph e. of Section 7 of Article IV-A of Title IV.

L. Sections 5 and 6 of Article V-A of Title V are changed to read.

5. The Government reserves the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges.

6. No salaries of the Contractor's executive officers or partners, no part of the expense incurred in conducting the Contractor's main office or regularly established branch offices, and no overhead expenses of any kind of the Contractor's main office or regularly established branch offices, except as specifically authorized in Section 1 of this Article, shall be included in the cost of the work under this contract; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

M. Paragraph 2 of paragraph d. of Section 3 of Article V-B of Title V is changed to read:

2. The fixed-fee of Three Hundred Seventy Thousand Dollars (\$370,000.00) for continued operation provided for in Section 4 of Article IV-A of Title IV shall be paid in twelve (12) partial payments of Thirty Thousand Eight

Hundred Thirty-three Dollars and Thirty-three cents (\$30,833.33) each, less 10% of each such partial payment, the first such partial payment to be payable on the last working day of the calendar month during which the additional operation provided for in such Section 4 of Article IV-A of Title IV shall have commenced, and the remaining partial payments to be payable on the last working day of each of the next succeeding eleven (11) months.

N. Article VI-A of Title VI is changed to read as follows:

**Article VI-A—Termination by Government.**

1. The Government may terminate the work under this contract in whole or in part at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the Contractor or which the Contractor may have against the Government.

2. Upon receipt of such notice the Contractor shall, unless the notice directs otherwise, complete the manufacture into finished product of all materials in process, immediately discontinue all work and the placing of all subcontracts for materials, facilities, supplies, and services in connection with the performance of this contract or part thereof terminated by said notice, and proceed to terminate promptly all existing subcontracts, insofar as such subcontracts are chargeable to this contract or part thereof terminated by said notice. The Contractor shall also take any and all steps necessary to vest in the Government any and all rights and benefits resulting to the

Contractor by reason of such termination, and the Contractor shall take any and all steps necessary to finally settle all matters in connection therewith (including protection of Government property and preparation thereof for removal or for storage) as may be required or approved by the Contracting Officer.

3. a. Thereafter the Contractor shall proceed with the settlement of his fixed-price subcontracts in accordance with the termination provisions thereof, if any, or, in the absence of such provisions, shall enter into negotiations with such fixed-price subcontractors, looking toward a negotiated settlement and an agreement upon cancellation charges, if any, resulting from the termination of cancellation of such subcontracts by reason of termination, in whole or in part, of this contract. The Contractor shall make every reasonable effort to arrive at a negotiated settlement in each such instance. Each such negotiated settlement shall be made expressly subject to the written approval of the Contracting Officer. Upon receipt of such written approval the amount of such settlement shall be paid by the Contractor unless payment direct by the Government is otherwise required. Approval of negotiated settlements of subcontracts shall be based upon such inquiry by the Contracting Officer as he deems reasonable under the circumstances.

b. The Contractor shall effect settlement and payment of each cost-plus-a-fixed-fee subcontract, unless payment direct by the Government is otherwise required, in accordance with the termination provision of such subcontract. In the event no termination provision is included in any such subcontract the Contractor shall make every reasonable effort to settle and terminate such subcontract and shall be reimbursed by the Government for all expenditures made in accordance with



the terms of such subcontract and not previously reimbursed by the Government. The Contractor shall also be reimbursed for any fixed-fee payments made by him on such terminated cost-plus-a-fixed-fee subcontracts, to the extent that such payments have not previously been reimbursed, it being recognized that equitable adjustments in such fixed-fees may be necessitated by such termination. Any such settlements or adjustments in fee shall be made expressly subject to the written approval of the Contracting Officer. Approval of such settlements or adjustments in fee shall be based upon such inquiry by the Contracting Officer as he deems reasonable under the circumstances.

c. The Contractor shall make every reasonable effort to effect settlement and payment (unless payment direct by the Government is otherwise required) of all other obligations, commitments and claims, the cost of which would be reimbursable in accordance with the provisions of this contract, that the Contractor, prior to said notice of termination may have undertaken or incurred in connection with the work terminated by said notice of termination. Such settlements shall be made expressly subject to the written approval of the Contracting Officer. Approval of such settlements shall be based upon such inquiry by the Contracting Officer as he deems reasonable under the circumstances.

d. In the event the Contractor, after diligent effort, is unable to effect a negotiated settlement as provided for in paragraphs a., b., or c. of this Section 3, or in the event any such settlement is disapproved by the Contracting Officer, and the Contractor is unable, by further negotiation, to effect a settlement acceptable to the Contracting Officer, the Government shall assume and become liable for the Contractor's liability under such

subcontract, obligation, commitment or claim and the Contractor shall execute and deliver to the Government all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such subcontract, obligation, commitment or claim.

e. Any other provision of this Section 3 to the contrary notwithstanding, the Government shall assume and become liable to the Contractor for the amount of any final judgment rendered against the Contractor by a Court of competent jurisdiction determining the liability of the Contractor under any subcontract, obligation, commitment or claim, the cost of which would be reimbursable in accordance with the provisions of this contract, that the Contractor prior to said notice of termination may have undertaken or incurred in connection with the work terminated by said termination notice; Provided (1) that the Contracting Officer shall find that the Contractor in good faith made a reasonable attempt to negotiate an adjustment of such liability without litigation and (2) that the Contractor gave the Contracting Officer prompt notice of the initiation of the proceedings in which such judgment was rendered and had offered the Government control of the defense of the proceedings; Provided, further that there shall be added to the amount of such final judgment all costs of the Contractor in connection with said suit, including but not limited to, cost of litigation, attorney fees, accounting fees, and clerical expenses; Provided, further, that if at any time prior to final judgment a settlement is finally negotiated and approved in writing by the Contracting Officer, the Contractor shall pay the amount of such settlement and shall be reimbursed therefor and for all costs and expenses in connection therewith unless payment direct by the Government is otherwise required.

f. As a condition of any settlement by the Contractor as provided for in this Section 3, the Contractor shall obtain a release approved by the Contracting Officer as evidence that such payment constitutes complete and final settlement of the claim of the third party against the Contractor; Provided, that, with the approval of the Contracting Officer, such release may except any claims which the third party may have against the Contractor and which have not become liquidated at the time of such payment.

4. If this contract or any part thereof is terminated for the convenience of the Government, the Contractor will be paid all fixed-fees which have accrued at the date of termination and all fixed-fees, if any, accruing pursuant to Section 2 of this Article, less fixed-fee payments previously made hereunder. If the contract or any part thereof is terminated due to the fault of the Contractor, no additional payment on account of fixed-fees for the work terminated will be made after the effective date of the termination. In the event of partial termination, an equitable adjustment in the fixed-fee shall be made in cases where the circumstances warrant. Such adjustments shall be reduced to writing as an amendment to this contract prior to final settlement hereunder.

5. If this contract or any part thereof is terminated for the fault of the Contractor, the Contracting Officer may enter upon the premises for the purpose of completing the work so terminated, may take possession of any and all materials, tools, machinery, equipment and appliances, and may exercise all options, privileges, and rights in connection therewith, and may complete or employ any other person or persons to complete said work.

6. a. The Government shall reimburse the Contractor for all costs and expenses incurred pursuant to this Article in accordance with the provisions of Title V. Without limiting the generality of the foregoing, it is expressly understood and agreed that the following costs and expenses are included:

(1) Costs incurred by the Contractor in preventing or reducing loss resulting from termination and for the protection, removal, storage, transportation (including delivery costs resulting from directions of the Contracting Officer) of property in which the Government has an interest under this contract.

(2) Accounting, legal, litigation, clerical and other expenses in connection with the termination of this contract, or part thereof, and any subcontract hereunder;

(3) All sums paid to subcontractors or to third parties on account of termination; provided such payments have been approved or ratified by the Contracting Officer.

b. Also, the Government shall pay a fixed-fee for services of the Contractor in connection with the termination of this Contract, to be negotiated as soon after the services of the notice of termination as practicable. Such fee shall be provided for in writing as an amendment to this contract prior to final settlement hereunder. Such fixed-fee shall be based upon an estimate of the cost of the work under this Article agreed to by the Contractor and the Government. The Contractor shall proceed immediately with the prosecution of the work required under this Article pending agreement upon the fixed-fee to be paid therefor.



7. The obligation of the Government to make any of the payments to the Contractor or any subcontractor required by this Article shall be subject to any claims in connection with this contract which the Government may have against the Contractor.

8. Prior to final settlement the Contractor shall furnish the release referred to in Section 4 of Article V-B of Title V of this contract, when required.

9. Any other provision of this Article to the contrary notwithstanding, it is expressly understood and agreed that the work done by the Contractor pursuant to any notice of termination given under this Article or pursuant to this Article is part of the work under this contract, and that such work will be done and all payments in connection therewith will be made under and in accordance with the applicable terms of this contract, including but not limited to the terms providing for reimbursement advances, disputes and responsibility of the Contractor.

10. For the purposes of this Article the word "subcontract" is defined as any agreement by the Contractor with any third person which involves the furnishing of any materials, supplies, machinery, equipment, or services in connection with the performance, wholly or in part, or any of the work described in this contract. A "subcontractor" is any person with whom any such agreement is made.

O. Section 1 of Article VII-G of Title VII is changed to read:

1. a. Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for

such periods of time as the Contracting Officer may require, provided same are obtainable. Such bond or insurance policy shall contain an indorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States.

b. The Contractor shall give the Contracting Officer or his representative immediate notice in writing of any suit or action filed against the Contractor arising out of the performance of this Contract and of any claim against the Contractor the cost and expense of which are reimbursable under the provisions of Article V-A hereof, and the risk of which is then uninsured or in which the amount claimed exceed the amount of insurance coverage. The Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor. Insofar as the following shall not conflict with any policy or contract of insurance, and upon request of the Contracting Officer, the Contractor shall do any and all things to effect an assignment and subrogation in favor of the Government of all Contractor's rights and claims against the Government, arising from or growing out of such asserted claims, and, if required by the Contracting Officer, shall authorize representatives of the Government to settle and/or defend any such claim and to represent or take charge of any such litigation affecting the Contractor.

c. The Contractor agrees that it will incorporate by reference in each cost-plus-a-fixed-fee subcontract made hereunder, subsequent to the approval date of the Sixth Supplement to this Contract, the terms and conditions of this prime contract regarding insurance and liability.

P. Section 9 is added to Article VII-G of Title VII to read:

9. Renegotiation pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

a. Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to the Contractor under this contract can be determined with reasonable certainty, the Fixed-fees specified in Article IV-C of Title IV hereof will be renegotiated to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for commencement thereof not later than one year after the close of the fiscal year of the Contractor within which completion of termination of the contract, as determined by the Secretary, occurs.

b. The Contractor will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

c. The Government shall retain from amounts otherwise due the Contractor, or the Contractor shall repay to the Government if paid to him, any amount of the Fixed-fees specified in Article IV-C found as a result of such renegotiation to represent excessive profits and not eliminated through reductions in Fixed-fees specified in Article IV-C or otherwise, as the Secretary may direct.



d. The Contractor will include in each subcontract described in paragraph f. (2) (ii) of this Section and in each subcontract for an amount in excess of \$100,000 described in paragraph f. (2) (i) of this Section, made by the Contractor under this contract, subsequent to the date of this Supplement, the following provision:

"Article ..... Renegotiation to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

"(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to (subcontractor) ..... under this contract can be determined with reasonable certainty, the Secretary and (subcontractor) ....., will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the close of the fiscal year of the subcontractor within which completion or termination of the contract, as determined by the Secretary, occurs.

"(2) (Subcontractor) ..... will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

"(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,—



(a) Be deducted by (contractor) ..... from payments otherwise due to (subcontractor) ..... under this contract; or

(b) Be paid by (subcontractor) ..... directly to the Government, if paid to him; or

(c) Be eliminated through reductions in the contract price or otherwise.

"(4) (Subcontractor) ..... agrees that (contractor) ..... shall not be liable to (subcontractor) ..... for or on account of any amount paid to the Government by (subcontractor) ..... or deducted by (contractor) ..... from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, (contractor) ..... is obligated to pay or credit to the Government all amounts withheld by it from (subcontractor) ..... hereunder.

"(5) (Subcontractor) ..... agrees (a) upon direction of the Secretary, to include in any subcontract hereunder paragraphs (1) to (6) inclusive of this Article, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary and which the Secretary directs (subcontractor) ..... to withhold from payments otherwise due under such subcontract and actually unpaid at the time (subcontractor) ..... receives such direction.

"(6) As used in this Article,—

(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary including the Contracting Officer.

(b) The term 'subcontract' means any purchase order, agreement or arrangement within the definition set forth in Section 403(a)(5) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and not exempt under or exempted pursuant to that Act.

(c) The terms 'renegotiate' and 'renegotiation' have the same meaning as in Section 403(b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(d) The term 'this contract' means this contract as modified from time to time."

e. (1) The Contractor agrees to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this Article.

(2) If any renegotiation between the Secretary and any subcontractor pursuant to the provisions required by Section d. hereof results in a reduction of the contract price or fixed-fee of the subcontract, the Government shall retain from payments otherwise due to the Contractor, or the Contractor shall repay to the Government, as the Secretary may direct, the amount of such reduction which the Secretary directs the Contractor to withhold from payments otherwise due to the subcontractor under the subcontract and actually unpaid at the time the Contractor receives such direction.

f. As used in this Article—

(1) The term "Secretary" means the Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

(2) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any material, part, assembly, machinery, equipment or other personal property, required for the performance of this contract, or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring, a contract or contracts with a Department or a subcontract or subcontracts thereunder, unless exempt under or exempted pursuant to Section 403(i) of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended.

(3) The terms "renegotiate" and "renegotiation" have the same meaning as in Section 403(b) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

(4) The term "this contract" means this contract as modified from time to time.



**Q. Article VII-I of Title VII is changed to read:**

**Article VII-I—Convict Labor.**

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor. This provision shall not be construed to prevent the Contractor or any subcontractor hereunder from obtaining any of the supplies, or any component parts or ingredients thereof, to be furnished under this contract or any of the materials or supplies to be used in connection with the performance of this contract, directly or indirectly, from any Federal, State or territorial prison or prison industry; Provided, That such articles, materials or supplies are not produced pursuant to any contract or other arrangement under which prison labor is hired by or employed or used by any private person, firm or corporation.

**A. Article VII-N of Title VII is changed to read:**

**Article VII-N—Disputes.**

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor at his address shown herein. Within 30 days from said mailing the Contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual, or individuals, other than the Contracting Officer, or a



board as his authorized representative to determine appeals under this Article. The Contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. The president of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the transaction of the business of the board or of a division, respectively, and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division, as the case may be. If a majority of the members of a division are unable to agree on a decision or if within 30 days after a decision by a division, the board or the president thereof direct that the decision of the division be reviewed by the board, the decision will be so reviewed, otherwise the decision of a majority of the members of a division shall become the decision of the board. If a majority of the members of the board is unable to agree upon a decision, the president will promptly submit the appeal to the Under Secretary of War for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers, nor affect the duties of the board or division nor of the remaining members of the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose, may hold hearings, examine witnesses, receive evidence and report the evidence to the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for.

and shall be deemed to be within the contemplation of this contract.

S. Article VII-R of Title VII is changed to read:

**Article VII-R—Notice to Government of Labor Disputes.**

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor will immediately give notice thereof to the Contracting Officer. Such notice shall include all relevant information with respect to such dispute.

T. Article VII-U of Title VII is changed to read:

**Article VII-U—Definitions.**

1. The term "Chief of Branch" refers to either the Chief of Ordnance or to the Chief of Engineers, dependent upon the particular function involved, as described in Section 4 below; and includes any person or board, other than the Contracting Officer, duly authorized to represent them respectively.

2. The term "Secretary of War" includes the Under Secretary of War and any person or board, other than the Contracting Officer, duly authorized to represent the Secretary of War or the Under Secretary of War.

3. For the signing of this contract, the term "Contracting Officer" means both the Contracting Officer in the Office of the Chief of Engineers appointed for that purpose by the Chief of Engineers, and the Contracting Officer appointed by the Chief of Ordnance. For the

signing of any modification of this contract, the term "Contracting Officer" means the Contracting Officer appointed by the Chief of Ordnance (or a Contracting Officer designated as the duly authorized representative of the Ordnance Contracting Officer so appointed by the Chief of Ordnance), and, where the modification relates to the functions of the Corps of Engineers as described in Section 4 below, means, in addition, the Contracting Officer in the Office of the Chief of Engineers appointed for that purpose by the Chief of Engineers. For all other purposes, the term "Contracting Officer" refers either to the District Engineer of the United States Engineers District in which the contract work is being performed, or the Contracting Officer appointed by the Chief of Ordnance, dependent upon the particular function involved as described in Section 4 below; and includes their respective successor or duly authorized representatives.

4. The Corps of Engineers' functions are: Prior to acceptance of the project or any part thereof by the Ordnance Department as the Using service, the approval of the performance of all construction work and the acceptance thereof; the approval of the preparation of detailed plans and working drawings for roads, railroads, sewage systems, water systems, electrical generating plants and transmission lines, heating plants, non-manufacturing buildings (such as offices, general warehouses and garages); and the approval of such miscellaneous construction as may be requested by the Chief of Ordnance. The above described Contracting Officers representing the Corps of Engineers, shall have no further authority under the Contract with respect to any part of the project which has been accepted by the using service. The Ordnance Department's functions are: All functions other than the Corps of Engineers' functions set forth in the two preceding sentences.



U. Article VII-V of Title VII is changed to read:

**Article VII-V—Anti-Discrimination.**

1. The Contractor, in performing the work required by this Contract shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

2. The Contractor agrees that the provision of Section 1 above will also be inserted in all of its subcontracts made subsequent to the approval of this Supplement. For the purpose of the article a subcontract is defined as any contract entered into by the Contractor with any individual, partnership, association, corporation, estate, or trust, or with any business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

V. The provisions of paragraphs a. and b. of paragraph 2 of Change Order No. 2 dated May 5, 1943 have been inserted as paragraph g. of Section 1 of Article I-E of Title I; and the provisions of Change Order No. 5 dated October 6, 1943 have been inserted as paragraph f. of Section 7 of Article IV-A of Title IV. Therefore, Change Orders No. 2, 3 and 5 are hereby superseded.

W. It is expressly understood and agreed that upon the execution and approval of this Sixth Supplemental Contract, paragraphs F., G. and I. hereof shall become effective retroactively as of the date of the Original Contract.



X. Except as herein provided the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

Y. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

None.

In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

**THE UNITED STATES OF  
AMERICA,**

(Sgd.) By **CARROLL D. HUDSON,**

(Carroll D. Hudson)

Lt. Col., Or. Dept., Executive  
Officer, Field Director  
Ammunition Plants  
(Contracting Officer appointed  
by the Chief of  
Ordnance.)

JJMcI

(Sgd.) By **O. P. EASTERWOOD, JR.,**

(O. P. Easterwood, Jr.)

WMM

Major, Corps of Engineers.  
(Contracting Officer appointed  
by the Chief of  
Engineers.)

**SILAS MASON COMPANY,**

(Contractor)

(Sgd.) By **R. L. TELFORD,**

Vice Pres.

500 5th Ave.,  
New York 18, N. Y.  
(Business Address.)

Two Witnesses as to Execution by the Contractor:  
(Sgd.) R. L. WILSON.

Box 1162,  
Shreveport, La.  
(Address.)

(Sgd.) KATHARINE MORELAND.

Box 1162,  
Shreveport, La.  
(Address.)

I, C. L. Taylor, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that R. L. Telford who signed this contract on behalf of the contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Sgd.) C. L. TAYLOR,  
Assistant Secretary.

(Corporate Seal)

Due to change in identification system of modifications to contracts this Change Order is numbered 7, there being in existence Supplements 1, 4 and 6, and Change Orders 2, 3 and 5.

Parsons/ap.

Date: February 19, 1944.

Change Order No. 7.

Contract No. W-ORD-517, DA-W-ORD-4, as Amended.

**War Department—Ordnance Department.**

**Change Order**  
**to**  
**Cost Plus A Fixed Fee**  
**New Ordnance Facility.**  
**Construction and Operation Contract.**

**Contractor:** Silas Mason Company, New York, N. Y.

**Name and Location of Plant:** Louisiana Ordnance Plant, Minden, La.

1. Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, as amended, the following additional work is hereby ordered:

a. Upon completion or upon receipt of a notice of termination, wholly or in part, of this contract, and whether such termination is for default, or for the convenience of the Government, the Contractor is hereby authorized to do and shall do all things necessary to make the Plant safe and free from explosive hazards, insofar as is reasonably possible to do so. The Contractor is hereby obligated to perform such work even though the notice of termination is silent as to placing the Plant in a safe and non-hazardous condition.

2. It is expressly understood and agreed that the foregoing is deemed to be part of the work under this Contract, as amended, and that the carrying out of said work will be done under, and in accordance with the applicable provisions of this Contract, as amended.

3. It is understood and agreed that in event of termination of this Contract, the Contractor may include the estimated cost of the work hereby ordered in the estimated cost of the work of terminating this Contract and that pursuant to the provisions of Article VI-A of Title VI of this Contract, as amended, it will be paid a fee thereon as provided in said Article VI-A. If this Contract is not terminated, but is completed, a separate fee will be negotiated to cover the work hereby ordered in lieu of a fee under Article VI-A of Title VI; provided, however, that the Contractor makes claim to the Contracting Officer for such fee within 30 days after completing this Contract and that an estimate of the cost of the work hereby ordered is submitted by the Contractor within said 30 day period.

4. Except as hereby changed, the terms and conditions of said Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order.

THE UNITED STATES OF  
AMERICA,

(Sgd.) By RAYMOND REBSAMEN,

(Raymond Rebsamen)

Lt. Col., Ord. Dept. Execu-  
tive Officer, Field Direc-  
tor of Ammunition Plants,  
Contracting Officer.

JJMCI

Receipt is hereby acknowledged of the above Change  
Order No. 7 to Contract No. W-ORD-517 DA-W-ORD-4,



dated July 3rd, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: Feb. 28th, 1944

**SILAS MASON COMPANY,**  
(Contractor)

(Sgd.) By **R. L. TELFORD.**

Parsons/ap.

Change Order No. 8.

Contract No. W-ORD-517, DA W-ORD-4, as amended.

All Communications Should Be Accompanied by Carbon Copy and Addressed to

Army Service Forces,  
Office of the Chief of Ordnance,  
Office of the Field Director of Ammunition Plants,  
3629 Lindell Boulevard,  
St. Louis 8, Missouri.

3 March 1944.

To Insure Prompt Attention in Replying Refer to No.  
Attention of OOSL—Legal Unit.

Silas Mason Company,  
Louisiana Ordnance Plant,  
Shreveport, Louisiana.

Re: Continued Operation.

Gentlemen:

Pending negotiations for a third year's operation of the Louisiana Ordnance Plant, the execution and approval

of a letter of award and the preparation, execution and approval of a formal supplement to Contract No. W-ORD-517 DA-W-ORD-4, as amended, providing for such continued operation, you are hereby authorized and directed, pursuant to the provisions of Article VII-C of Title VII of said contract, until notified to the contrary, to make such purchases of raw and manufactured materials, supplies, etc., necessary for such continued operation (third year), as though you had a formal supplement to said contract providing therefor, and, unless sooner notified to the contrary, upon completion of your second year's operation of said Plant, continue with the operation thereof, as directed from time to time by the Contracting Officer, in accordance with production schedules.

Any purchases and/or operation hereby authorized shall be carried on in accordance with all applicable terms and conditions of Contract No. W-ORD-517 DA-W-ORD-4, as amended, including, without limiting the generality of the foregoing, those relating to reimbursement for the work. A fixed-fee for any operation of said plant beyond June 7, 1944, will be negotiated. Funds are presently available for the foregoing work under Procurement Authorities:

5-9762 P210 A 210/40141.

5-9763 P210 A 210/40141.

5-50179 P510 A 21-111/40025.

5-50180 P531 A 21-111/40025.

5-22578 P120 A 212/41005.

Please indicate your acceptance by signing the three inclosed copies and returning the original and one of the carbon copies of same to this office.

For the Chief of Ordnance:

Yours very truly,  
(Sgd.) **RAYMOND REBSAMEN,**  
(Raymond Rebsamen)

Lt. Col., Ord. Dept. Execu-  
tive Officer, Field Direc-  
tor Ammunition Plants,  
Contracting Officer.

JJMcl

Receipt is hereby acknowledged of the above Change Order No. 8 to Contract No. W-ORD-517 DA-W-ORD-4, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: March 6th, 1944.

**SILAS MASON COMPANY,**  
(Contractor)

(Sgd.) By **R. L. TELFORD.**

Due to change in identification system of modifications to contracts this Supplement is numbered 9, there having been executed Supplements 1, 4 and 6, and Change Orders 2, 3, 5, 7 and 8.

Contract No. **W-ORD-517 DA-W-ORD-4.**

Supplement 9.

Approved: ..... 1944.

**L. H. CAMPBELL, JR.,**

Major General, Chief of Ordnance.

By **E. P. RUSSELL,**

Lt. Col., Ord. Dept.

**Supplemental Contract  
to  
Cost-Plus-A-Fixed-Fee  
New Ordnance Facility  
Construction and Operation Contract.**

**War Department.**

**Contractor: Silas Mason Company.**

**Place: At or near Minden, Louisiana.**

**Supplemental Contract for: Additional operation (3rd year) and modification of provisions pertaining to fixed-fee, transportation and renegotiation.**

**No change is made in the Estimated Cost or Fixed-Fees by this Supplement except:**

**Estimated Cost under Title IV: (2nd year) \$15,800,000.00; (3rd year) \$28,303,000.00.**

**Fixed-Fee under Title IV: (3rd year) \$350,000.00.**

**Payments to be made by Finance Officer, U. S. Army at New Orleans, Louisiana.**

**The New Ordnance Facility, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same.**

**5-9762 P210 A 210/40141.**

**5-9763 P210 A 210/40141.**



5-50179 P510 A 21-111-40025.

5-50180 P531 A 21-111/40025.

5-22578 P130 A 212-41005.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended, the Act approved December 18, 1941 (Public Law 354, 77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

### Supplemental Contract.

This Supplemental Contract, entered into this 25th day of May, 1944, by the United States of America, hereinafter called "the Government" represented by the Contracting Officers executing this contract, and Silas Mason Company, a corporation organized and existing under the laws of the State of Delaware, of the city of New York, in the State of New York, hereinafter called "the Contractor", Witnesseth That:

Whereas, there is now in force between the parties hereto a certain contract dated July 3, 1941, identified by the Government as Contract No. W-ORD-517 DA-W-ORD-4 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, said Original Contract has been amended by Supplemental Contracts dated April 11, 1942, July 6, 1943 and October 15, 1943, which Supplemental Contracts are identified by the Government as Contract No. W-

ORD-517 DA-W-ORD-4-Supplements 1, 4 and 6 respectively, and by Change Orders No. 2, 3, 5, 7 and 8 dated May 5, 1943, May 28, 1943, October 4, 1943, February 19, 1944 and March 3, 1944, respectively; and

Whereas, the Government now desires to further modify the Original Contract, as amended, to provide for additional operation (3rd year), and to change the clauses pertaining to fixed-fee, transportation and renegotiation; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions herein-after set out; and

Whereas, the accomplishment of the above described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the above described work; and

Whereas, it has been administratively determined that the above described modifications will facilitate the prosecution of the war;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

A. Section 1 of Article I-A of Title I is changed to read:

1. The New Ordnance Facility, hereinafter referred to as the "Plant", and designated as Louisiana Ordnance Plant, shall comprise a plant at or near Minden, La., upon a site to be furnished and made available by the Government, for the loading of fixed rounds, shells, bombs, boosters and fuses (hereinafter sometimes referred to as "Ammunition") including manufacture of smetal and of nitrate of ammonia from neutral nitrate of ammonia solution for the foregoing types of Ammunition, having an estimated daily capacity based on a twenty-four (24) hour day as follows:

(a) 95,000 Fixed Rounds 20mm. of equivalent, complete except for detonators;

(b) 8,400 Rounds 155mm. Shell, or equivalent, but without any other components;

(c) 2,880 100 lb. Bombs or equivalent together with auxiliary boosters only.

B. Section 4 of Article IV-A of Title IV is changed to read:

4. a. Upon written notice to the Contractor not less than ninety (90) days before the anticipated completion of the operation provided for in Section 3 next above, the Government may, at its option, authorize the continued operation of the Plant for an additional period of twelve (12) months and the Contractor shall undertake such continued operation under the terms and conditions of this contract applicable to the operation of the Plant (including those relating to the fixed-fee for such addi-

tional operation, which fee shall be that provided in Section 3 of Article IV-C, hereof).

b. Beginning June 8, 1944, the Contractor shall, as directed from time to time by the Contracting Officer, operate the Plant for an additional period of twelve (12) months (June 8, 1944 to June 8, 1945). Any operation after June 7, 1945 shall be subject to mutual agreement after negotiation.

C. Paragraph g is added to Section 7 of Article IV-A of Title IV to read:

g. The Contractor is authorized to and shall, in accordance with the instructions of the Contracting Officer, load, renovate or rehabilitate at the Plant any ammunition or its components even though not specifically mentioned herein, in such quantities as may be directed by the Contracting Officer; provided, however, that the Contractor shall not be obligated to load, renovate, or rehabilitate any types or quantities of ammunition or its components which the facilities of said Plant may not be capable of loading, renovating or rehabilitating.

D. Article IV-B of Title IV is changed to read:

#### Article IV-B—Estimates.

It is estimated as of the date of the Original Contract that the cost of the work under this Title IV prior to the continued operation covered by the option therefor provided in paragraph a of Section 4 of Article IV-A hereof will be Twenty-Five Million One Hundred Thousand Dollars (\$25,100,000.00), exclusive of the Contractor's fee. It is estimated as of February 13, 1943 that the cost of the work provided for in the option contained in para-



graph a of Section 4 of Article IV-A of this Title IV will be approximately Fifteen Million Eight Hundred Thousand Dollars (\$15,800,000.0), exclusive of the Contractor's fee. It is estimated as of the date of the Ninth Supplement to this contract that the cost of the work provided for in paragraph b of Section 4 of Article IV-A of this Title IV (third year) will be Twenty-eight Million Three Hundred Three Thousand Dollars (\$28,303,000.00), exclusive of the Contractor's fee. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of these estimates. The estimated total costs set forth above are based upon estimates agreed to by both the Government and the Contractor, copies of which are on file in the Office of the Chief of Ordnance.

E. Section 3 of Article IV-C of Title IV is changed to read:

3. A fixed-fee for continued operation provided in paragraph a of Section 4 of Article IV-A hereof, as follows Three Hundred Seventy Thousand Dollars (\$370,000.00) for twelve (12) months operation, (June 8, 1943 through June 7, 1944) which fee shall constitute complete compensation for Contractor's services during continued operation, including profit, other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

F. Section 4 of Article IV-C of Title IV is changed to read:

4. A fixed-fee for the work provided for in paragraph b of Section 4 of Article IV-A hereof, in the amount of Three Hundred Fifty Thousand Dollars (\$350,000.00), which fee shall constitute complete compensation for the

Contractor's services during such operation, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

G. Paragraph c of Section 1 of Article V-A of Title V is changed to read:

c. Transportation, loading, unloading, demurrage and storage charges on materials, supplies, cars and equipment, including expenses of removing rejected property under Article VII-D of Title VII hereof.

H. Paragraph (2) of paragraph d of Section 3 of Article V-B of Title V is changed to read:

(2.) The fixed-fee of Three Hundred Seventy Thousand Dollars (\$370,000.00) provided by Section 3 of Article IV-C for continued operation under paragraph a of Section 4 of Article IV-A of Title IV shall be payable in twelve (12) equal monthly installments of Thirty Thousand Eight Hundred Thirty-three Dollars and Thirty-three Cents (\$30,833.33) each, less 10% of each such installment. The first such installment shall be payable on the last working day of the calendar month during which the additional operation provided for in paragraph a of Section 4 of Article IV-A of Title IV shall have commenced and the remaining installments shall be payable on the last working day of the next succeeding eleven (11) calendar months.

I. Paragraph (3) is added to paragraph d of Section 3 of Article V-B of Title V to read:

(3.) The fixed-fee of Three Hundred Fifty Thousand Dollars (\$350,000.00) provided by Section 4 of Article IV-C of Title IV for additional operation under para-

graph b of Section 4 of Article IV-A of Title IV, shall be payable in twelve (12) equal monthly installments of Twenty-nine Thousand One Hundred Sixty-six Dollars and Sixty-six Cents (\$29,166.66) each, less ten percent (10%) of each such installment. The first such installment shall be payable on the 8th day of July, 1944, and a like installment shall be payable on the same day of each of the next succeeding eleven (11) months.

J. Section 9 of Article VII-G of Title VII is changed to read:

9. a. This contract shall be deemed to contain all the provisions required by subsection (b) of the Renegotiation Act as amended by Section 701 of the Revenue Act of 1943 (Public Law No. 235, 78th Congress, enacted February 25, 1944).

b. In compliance with said subsection (b) of the Renegotiation Act, the Contractor shall insert in the subcontracts specified in said subsection (b) which are executed subsequent to the date of this Ninth Supplemental Contract either the provisions of this Section or the provisions required by said subsection (b).

K. Except as herein provided, the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

L. This Supplemental Contract shall be subject to the written approval of the Chief of Ordnance or his duly authorized representative and shall not be binding until so approved.



M. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

None.

In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

**THE UNITED STATES OF  
AMERICA,**

(Sgd.) By **RAYMOND REBSAMEN,**  
(Raymond Rebsamen)

Lt. Col., Ord. Dept, Execu-  
tive Officer, Field Direc-  
tor of Ammunition Plants.  
(Contracting Officer ap-  
pointed by the Chief of  
Ordnance.)

JJMcl

(Sgd.) By **O. P. EASTERWOOD, JR.,**  
(O. P. Easterwood, Jr.)  
Major, Corps of Engineers.  
(Contracting Officer ap-  
pointed by the Chief of  
Engineers.)

**SILAS MASON COMPANY,**  
(Contractor)

(Sgd.) By **R. L. TELFORD,**  
Vice President.

500 Fifth Avenue,  
New York, New York.  
Business Address.



Two Witnesses as to Execution by the Contractor:  
(Sgd.) H. H. HAGGARD.

Minden, La.  
Address:

(Sgd.) RUTH J. MacLEAD.

Shreveport, Louisiana.  
Address:

I, R. T. Buffington, certify that I am the Assistant Secretary of the Corporation named as Contractor herein, that R. L. Telford who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Sgd.) R. T. BUFFINGTON.

(Corporate Seal)

Due to change in identification system of modifications to Contracts this Change Order is numbered 10, there having been executed Supplements 1, 4, 6 and 9, and Change Orders 2, 3, 5, 7 and 8.

Parsons/111.

Date: 17 June 1944.

Change Order No. 10.

Contract No. W-ORD-517 DA-W-ORD-4, as Amended.

**War Department—Ordnance Department.**

**Change Order  
to  
Cost-Plus-A-Fixed-Fee  
New Ordnance Facility  
Construction and Operation Contract.**

**Contractor:** Silas Mason Company, New York, New York.

**Name and Location of Plant:** Louisiana Ordnance Plant, Minden, La.

1. Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, as amended, the following additional work is hereby ordered:

a. The Contractor is authorized to prepare such engineering studies as may be requested or approved by the Contracting Officer.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract W-ORD-517 DA-W-ORD-4, as amended.

3. There is no appreciable change in the estimated cost of the Contractor's services under said Contract and no change is made in the fixed-fee. No change in the time required for performance is involved.

4. Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with

equal force and effect in carrying out the provisions of this Change Order No. 10.

THE UNITED STATES OF  
AMERICA,

(Sgd.) By T. C. GERBER,

(T. C. Gerber)

Colonel, Ord. Dept. Field  
Director of Ammunition  
Plants, Contracting Of-  
ficer.

WDW

Receipt is hereby acknowledged of the above Change Order No. 10 to Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: June 26th, 1944.

SILAS MASON COMPANY,  
(Contractor)

(Sgd.) By R. L. TELFORD,  
V. P.

Contract No. W-ORD-517 DA-W-ORD-4.

Modification No. 11.

10 March 1944.

Fee Adjustment Agreement.

To Cost-Plus-A-Fixed-Fee Contract No. W-ORD-517 DA-W-ORD-4, dated the 3rd day of July, 1941, between the United States of America and Silas Mason Company, New York, N. Y., for architect-engineer services, construction of a new ordnance facility and installation of

equipment therein, procuring production equipment, and options for training key personnel for and operating a new ordnance facility for the loading of fixed rounds, shells, bombs, fuzes and boosters at or near Minden, Louisiana.

Whereas, the Contractor's fixed fee stipulated in Title I of the contract mentioned above is based upon the understanding that the Contractor will subcontract such portions of the work under said contract as may be approved by the Contracting Officer; and

Whereas, the Contractor named above has subcontracted the following described work:

(a) Specialized tests usually performed by commercial testing laboratories, at an estimated cost of \$7,097.

(b) Minor testing services and inspection of concrete and asphalt, at an estimated cost of \$7,916.

Now, Therefore, subcontracting of the above-mentioned work is hereby approved, and as a condition to such approval, it is determined and found by the Contracting Officer, and agreed to by the parties to said contract, that a decrease of \$530.00 in the fixed fee provided in said contract represents an equitable adjustment.

The foregoing will result in a change in the Contractor's fixed fee as follows:



Decrease in Contractor's fixed fee under Title I by reason of this fee adjustment agreement \$530.00.

**UNITED STATES OF  
AMERICA,**

By **WILLIAM A. DAVIS,**  
(William A. Davis)

Lt. Col., Corps of Engineers,  
District Engineer. (Con-  
tracting Officer appointed  
by the Chief of Engi-  
neers.)

By **JAMES H. ELLETT,**  
(James H. Ellett)

Major, Ord. Dept., Exec.  
Officer, Field Director of  
Ammunition Plants.  
(Contracting Officer ap-  
pointed by the Chief of  
Ordnance.)

JJMCI

Agreed to and accepted .. day of ..... 1944.

**SILAS MASON COMPANY,**  
(Contractor)

By .....  
Title .....

Witnesses as to signature of Contractor:

.....

.....

(Address.)

.....

.....

(Address.)

**Certification.**

I, ....., do hereby certify that I am the duly qualified ..... of the corporation named herein as Contractor; that ..... who signed this fee adjustment agreement on behalf of said corporation was then ..... of said corporation; that said fee adjustment agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

In Witness Whereof, I have hereunto affixed my hand and the seal of the ..... this .. day of ....., 1944.

.....  
(Corporate Seal)

Due to change in identification system of modifications to Contracts, this Change Order is numbered 12, there having been executed Supplements 1, 4, 6 and 9, and Change Orders 2, 3, 5, 7, 8 and 10. (Modification No. 11 pending.)

Parsons/ap.

Date 28 July 1944.

Change Order No. 12.

Contact No. W-ORD-517 DA-W-ORD-4, as amended.

## War Department—Ordnance Department.

Change Order  
toCost-Plus-A-Fixed-Fee New Ordnance Facility  
Construction and Operation Contract.

Contractor: Silas Mason Company, New York, New York.

Name and Location of Plant: Louisiana Ordnance Plant, Minden, La.

1. Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, as amended, the following additional work is hereby ordered:
  - a. Pending a formal supplement providing for procurement of equipment and operation of certain additional facilities, the Contractor shall procure such production equipment, not furnished by the Government, as will be required by the conversion of the minor caliber line of the Plant for the loading of mines AT6 and complete rounds M42A1 for 3" guns, the modification of the bomb line to provide capacity to load an additional 30,000 500# TNT bombs per month, and the construction of a new load line capable of loading 80,000 500# bombs per month, as may be approved or ratified by the Contracting Officer. The Contracting Officer shall advise the Contractor what production equipment the Government will furnish, if any.
2. A site letter has been approved covering said work and funds are available therefor. It is expressly understood and agreed that the foregoing is deemed to be

a part of the work under said Contract No. W-ORD-517 DA-W-ORD-4, as amended.

3. It is estimated that the total cost of the work under paragraph 1. a. hereof will be approximately \$611,000.00. It is estimated that the period of time required to perform said work will be two months. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of this estimate. Any fixed fee for the foregoing work will be negotiated as a part of said formal supplement.

4. Except as hereby changed, the terms and conditions of the Original Contract as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 12.

**THE UNITED STATES OF  
AMERICA,**

(Sgd.) By **JAMES H. ELLETT,**  
(James H. Ellett)

Major, Ord. Dept., Execu-  
tive Officer, Field Direc-  
tor of Ammunition Plants,  
Contracting Officer.

JJMcl

Receipt is hereby acknowledged of the above Change Order No. 12 to Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: July 31, 1944.

**SILAS MASON COMPANY,**  
(Contractor)

(Sgd.) By **R. L. TELFORD.**



Due to change in identification system of modifications to Contracts, this Change Order is numbered 13, there having been executed Supplements 1, 4, 6 and 9, and Change Orders 2, 3, 5, 7, 8, 10 and 12. (Modification No. 11 pending.)

Parsons/ap.

Date: 22 September 1944.

Change Order No. 13.

Contract No. W-ORD-517 DA-W-ORD-4, as Amended.

War Department—Ordnance Department.

Change Order to  
Cost-Plus-A-Fixed-Fee New Ordnance Facility  
Construction and Operation Contract.

Contractor: Silas Mason Company, New York, New York.

Name and Location of Plant: Louisiana Ordnance Plant, Minden, La.

1. Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, as amended, the following additional work is hereby ordered:

a. Pending the preparation and execution of a formal supplement, the Contractor shall furnish such management service, procure such production equipment as is not furnished by the Government, and inspect the installation of the production equipment, as may be ap-

proved or ratified by the Contracting Officer, as will be required by the modification of the Group II-A line at the Plant to provide capacity for loading 300,000 T6E1 mines per month. The Contractor is advised that the construction will be done under the supervision of the Corps of Engineers by collateral contracts.

2. A site letter has been approved covering said work and funds are available therefor. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract No. W-ORD-517 DA-W-ORD-4.

3. This Change Order will involve an appreciable increase in the cost of the work. Therefore, as soon as a detailed estimate is available it will be furnished to the Ordnance Department by the Contractor. It is estimated that the period of time required to perform said work will be approximately three months. Any fixed fee for the foregoing work will be negotiated as a part of said formal supplement.

4. Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 13.

**THE UNITED STATES OF  
AMERICA,**

(Sgd.) By O. P. EASTERWOOD, JR.,  
(O. P. Easterwood, Jr.)

Major, Corps of Engineers.

(Contracting Officer appointed by the Chief of Engineers.)

W.M.M.  
O.F.S.

(Sgd.) By JAMES H. ELLETT,  
(James H. Ellett)

Major, Ord. Dept., Execu-  
tive Officer, Field Direc-  
tor of Ammunition Plants.  
(Contracting Officer ap-  
pointed by the Chief of  
Ordnance.)

JJMcl

Receipt is hereby acknowledged of the above Change  
Order No. 13 to Contract No. W-ORD-517 DA-W-ORD-4,  
dated July 3, 1941, as amended, and the Contractor here-  
by accepts the terms and conditions thereof.

Date: Oct. 2nd, 1944.

SILAS MASON COMPANY,  
(Contractor)

(Sgd.) By R. L. TELFORD.

Parsons/ap.

Change Order No. 14.

Contract No. W-ORD-517 DA-WORD-4, as Amended.

Army Service Forces,  
Office of the Chief of Ordnance,  
Field Director of Ammunition Plants,  
St. Louis 8, Missouri.

12 January 1945.

In Reply Refer to: SPOLY-G Legal Section.

Silas Mason Company,  
Louisiana Ordnance Plant,  
Shreveport 1, Louisiana.

Re: Additional Facility Expansion.

Gentlemen:

Site letters have been approved authorizing construc-  
tion of five additional warehouses at the Plant with a

total of approximately 60,000 sq. ft. of space, the installation of equipment in two load lines to retool for items not currently being produced, and the construction of additional railroad facilities at the Plant.

Therefore, pending the negotiation and execution of a formal supplement to Contract No. W-ORD-517 DA-W-ORD-4, as amended, covering such modification, you are hereby authorized and directed, pursuant to the provisions of Article VII-C of Title VII thereof, to furnish such management service, procure such production equipment as is not furnished by the Government, inspect the installation of said equipment and operate said facilities, as may be approved or ratified by the Contracting Officer as will be necessary to provide for such facility expansion and for the operation thereof. Any architect-engineering, construction or installation of equipment will be done under the supervision of the Corps of Engineers by collateral contracts.

It is expressly understood and agreed that the work described herein is deemed to be a part of the work under said Contract No. W-ORD-517 DA-W-ORD-4, as amended; and that it shall be governed by all the applicable provisions of said contract, including, without limiting the generality of the foregoing, those pertaining to reimbursement.

The work authorized by this Change Order may involve an appreciable increase in the cost of the work. Therefore, it is understood and agreed that as soon as a detailed estimate of the amount of the work involved is available it will be furnished to the Ordnance Department by the Contract. Any fixed fee for the foregoing work will be negotiated as a part of said supplement.

Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 14.



If this Change Order is satisfactory, please so indicate by signing the three inclosed copies and returning one of the carbon copies and the original of same to this office for conforming and distributing.

For the Chief of Ordnance:

Yours very truly,

(Sgd.) S. M. STROHECKER, JR.,

(S. M. Strohecker, Jr.)

Colonel, Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer.

JJMcl

Receipt is hereby acknowledged of the above Change Order No. 14 to Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: Jan. 15th, 1945.

SILAS MASON COMPANY,  
(Contractor)

(Sgd.) By R. L. TELFORD,  
Vice Pres.

Parsons/ap.

Change Order No. 15.

Contract No. W-ORD-517 DA-W-ORD-4, as Amended.

Army Service Forces,  
Office of the Chief of Ordnance,  
Field Director of Ammunition Plants,  
St. Louis 8, Missouri.

30 March 1945.

In Reply Refer to: SPOLY-G Legal Section.

Silas Mason Company,  
Louisiana Ordnance Plant,  
Shreveport, Louisiana.

Re: Continued Operation.

Gentlemen:

Pending the execution and approval of a formal supplement to Contract No. W-ORD-517 DA-W-ORD-4, as amended, providing for continued operation of the Louisiana Ordnance Plant, you are hereby authorized and directed, pursuant to the provisions of Article VII-C of Title VII of said contract, until notified to the contrary, to make such purchases of raw and manufactured materials, supplies, etc., necessary for such continued operation as though you had a formal supplement to said contract providing therefor, and, unless sooner notified to the contrary, upon completion of the work provided for in paragraph b. of Section 4 of Article IV-A of Title IV of said contract, continue with the operation of said plant as directed from time to time by the Contracting Officer, in accordance with the production schedules.

All purchases and operation hereby authorized shall be carried on in accordance with all applicable terms and conditions of Contract No. W-ORD-517 DA-W-ORD-4, as amended, including, without limiting the generality of the foregoing, those relating to reimbursement for the

work. A fixed-fee for any operation of said plant beyond June 7, 1945, will be negotiated. Funds are presently available for the foregoing work under Procurement Authority

505-2762 P120 A212/51005.

Please indicate your acceptance by signing the three inclosed copies and returning the original and one of the carbon copies of same to this office.

For the Chief of Ordnance:

Yours very truly,  
(Sgd.) JOHN K. WILLARD,  
(John K. Willard)

Major, Ord. Dept., Executive Officer, Field Director of Ammunition Plants,  
Contracting Officer.

P.G.P.

Receipt is hereby acknowledged of the above Change Order No. 15 to Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: April 2, 1945.

SILAS MASON COMPANY;  
(Contractor)

(Sgd.) By R. L. TELFORD,  
Vice President and General Manager.

Due to change in identification system of modifications to contract this Supplement is numbered 16, there having been executed Supplements 1, 4, 6 and 9 and Change

Orders 2, 3, 5, 7, 8, 10, (Mod. 11 unilateral), 12, 13, 14 and 15.

Contract No. W-ORD-517 DA-W-ORD-4.

Supplement No. 16.

**Cost-Plus-A-Fixed-Fee  
New Ordnance Facility  
Construction and Operation Contract.**

**War Department.**

Approved: 11 July, 1945.

**L. H. CAMPBELL, JR., F.F.H.  
Lt. General, Chief of Ordnance.**

(Sgd.) By **E. P. RUSSELL,**  
(E. P. Russell)  
Colonel, Ord. Dept.

Contractor: Silas Mason Company, New York, N. Y.

Place: At or near Minden, Louisiana.

Supplemental Contract for: Additional facilities and continued operation (4th year); modification of provisions pertaining to procurement of equipment, fixed fees, title and final payment; and addition of clauses pertaining to consultant service and destruction of property.

This Supplement makes no change in the estimated cost or fixed fees except:

Estimated Cost under Title II: Increased \$572,475.00.

Fixed Fee under Title II: Increased \$1.00.



**Estimated Cost under Title IV: (4th year) \$29,985,-590.00.**

**Fixed Fee under Title IV: (4th year) \$350,000.00.**

**Payments to be made by Finance Officer, U. S. Army at New Orleans, Louisiana.**

The equipment, services and supplies to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

505-2762 P120 A212/51005.

505-2419 P120 A212/51005.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended; the Act approved December 18, 1941 (Public Law 354, 77th Cong.) and Executive Order No. 9001 dated December 27, 1941.

(Sgd.) JOHN K. WILLARD,  
(John K. Willard)

Lt. Col., Ord. Dept., Executive Officer, Field Director of Ammunition Plants, Contracting Officer.

### **Supplemental Contract.**

This Supplemental Contract, entered into this 30th day of May, 1945, by The United States of America,

hereinafter called "the Government", represented by the Contracting Officers executing this Contract, and Silas Mason Company, a corporation organized and existing under the laws of the State of Delaware, of the city of New York, in the State of New York, hereinafter called "the Contractor", Witnesseth That:

Whereas, there is now in force between the parties hereto a certain contract dated July 3, 1941, identified by the Government as Contract No. W-ORD-517 DA-W-ORD-4 and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, said Original Contract has been amended by Supplemental Contracts identified by the Government as Contract W-ORD-517 DA-W-ORD-4, Supplements 1, 4, 6 and 9, and Change Orders 2, 3, 5, 7, 8, 10, (Mod. 11 unilateral), 12, 13, 14 and 15; and

Whereas, the Government now desires to further modify the Original Contract, as amended, to provide for additional facilities and continued operation (4th year); to modify the clauses pertaining to procurement of equipment, fixed fees, title and final payment; and to add provisions pertaining to consultant service and destruction of property; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions hereinafter set out; and

Whereas, the accomplishment of the above described work and modifications under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the above described work; and

Whereas, it has been administratively determined that the foregoing will facilitate the prosecution of the war;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

A. Article I-A of Title I is changed to read:

**Article I-A—Description of New Ordnance Facility.**

1. The New Ordnance Facility hereinafter referred to as the "Plant" and designated as Louisiana Ordnance Plant, shall comprise a plant at or near Minden, Louisiana, upon a site furnished and made available by the Government for the loading of fixed, semi-fixed, and unfixed rounds, shells, bombs, mines, boosters and fuzes, (hereinafter sometimes referred to as ammunition), including the manufacturing of amatol and nitrate of ammonia from neutral nitrate of ammonia solution for the foregoing types of ammunition, having an estimated monthly capacity based on twenty-six (26) working days of twenty-four (24) hours per day as follows:

Line C: 2,000,000 Rounds Minor Caliber, or 1,000,000 Rounds Medium Caliber—TNT loaded, or 500,000 Anti-tank Mines;

Line D: 2,000,000 Rounds Minor Caliber, or 1,000,000 Rounds Medium Caliber—TNT loaded, or 500,000 Rounds Medium Caliber—press loaded;

Line E: 100,000 100# Bombs, or equivalent;

Line F: 120,000 250# Bombs, or equivalent;

Line S: 500,000 155mm shell, or equivalent;

Line G: 400,000 M56 Fuze, or equivalent;

Line H: 400,000 M56 Fuze, or equivalent, or 20,000 155mm shell, or equivalent;

Line J: 400,000 M104 Booster, or equivalent;

Line K: 200,000 Fuzes;

Line N: 7,500,000 Pounds Nitrate of Ammonia.

2. Said plant shall consist of loading buildings, nitrate of ammonia evaporating and graining buildings, administration buildings, shops, railroads, roads, steam lines, air lines, electric lines, telephone lines, fences, lighting power houses, dormitories, water and sewer system, staff dwellings, cafeterias, guard headquarters, fire fighting equipment and provisions for the housing thereof, inert storage warehouses, ammonium storage warehouse, explosive and ammunition igloo storage magazines, chemistry and gage laboratories, burning grounds, demolition and proof testing pits and areas, together with other buildings and equipment necessary or appropriate for a loading plant of the approximate capacity aforesaid, with storage buildings adequate for about 30 days' supply of incoming materials and about 60 days' production of finished product.

3. Said Plant shall conform, insofar as is practicable, with typical designs, drawings, specifications, details,



standards or instructions which are on file in the offices of the Chief of Ordnance and the Chief of Engineers and which shall be promptly furnished to the Contractor, or which will be furnished hereafter by the Contracting Officer; Provided, however, that no portion of said Plant shall consist of a permanent type of construction unless specifically authorized in advance by the Secretary of War; and Provided further, that nothing herein shall prevent the use of a type of construction sufficiently substantial for the use intended, in the judgment of the Contracting Officer, as evidenced by his approval of the plans and specifications.

B. The following is added as Article I-H to Title I:

**Article I-H—General.**

1. Anything in this Title I to the contrary notwithstanding, any architect-engineering or construction required in connection with the facilities added to the Plant by Supplement Sixteen (conversion of minor caliber line for the loading of mines AT6 and complete rounds M42A1 for three inch guns; modification of bomb line to increase capacity for loading 500# TNT bombs by 30,000 per month; construction of new load line capable of loading 60,000 500# bombs per month; modification of Group II-A line to provide capacity for loading 300,000 T6E1 mines per month; construction of five warehouses with a total of approximately 60,000 square feet of space; installation of equipment in two load lines to retool for the loading of new items; and construction of additional railroad facilities at the Plant) will be done by collateral contract under the supervision of the Corps of Engineers.

C. Section 1 of Article II-A of Title II is changed to read:

1. The Contractor shall, in the shortest reasonable time, determine the production equipment requirements for the Plant and shall, subject to the approval of the Contracting Officer, thereupon proceed to do all things necessary and incident to the procurement of the production equipment required, and inspect the installation of such equipment.

D. Article II-B of Title II is changed to read:

**Article II-B—Estimates.**

1. It is estimated (as of the date of the Original Contract) that the total cost of the work covered by this Title II as described in the Original Contract, will be approximately Three Million One Hundred Thirty-eight Thousand Two Hundred Dollars (\$3,138,200.00), exclusive of the Contractor's fee.

2. It is estimated that the total cost of the work added to this Title II by Supplement Sixteen to this Contract (procurement of such production equipment as is necessary for the (1) conversion of minor caliber line for the loading of mines AT6 and complete rounds M42A1 for three inch guns; (2) modification of bomb line to increase capacity for loading 500# TNT bombs by 30,000 per month; (3) equipping of new load line capable of loading 60,000 500# bombs per month; (4) modification of Group II-A line to provide capacity for loading 300,000 T6E1 mines per month; (5) equipping of five warehouses with a total of approximately 60,000 square feet of space; and (6) equipping of two load lines to retool for the loading of new items) will be Five Hundred

Seventy-two Thousand Four Hundred Seventy-five Dollars (\$572,475.00), exclusive of the Contractor's fee, and that said work will be completed within six months from January 12, 1945.

3. It is expressly understood, however, that neither the Contractor nor the Government guarantees the correctness of any of the foregoing estimates. The estimated total costs set forth herein are based upon estimates agreed to by both the Government and the Contractor, copies of which are on file in the Office of the Chief of Ordnance.

E. The following is added as Section 3 of Article II-C of Title II:

3. A fixed-fee in the amount of One Dollar (\$1.00) which shall constitute complete compensation for the Contractor's services in connection with the work added to this Title II by Supplement Sixteen to this Contract, including profit other than that included in the prices quoted pursuant to Section 2 of Article II-A of Title II hereof.

F. Paragraph b of Section 4 of Article IV-A of Title IV is changed to read:

b. Beginning June 8, 1944, the Contractor shall, as directed from time to time by the Contracting Officer, operate the Plant for an additional period of twelve (12) months (June 8, 1944 to June 8, 1945).

Q. The following is added as paragraph c to Section 4 of Article IV-A of Title IV:

c. Beginning June 8, 1945, the Contractor shall, as directed from time to time by the Contracting Officer,

operate the Plant for an additional period of twelve (12) months (June 8, 1945 to June 8, 1946). Any operation after June 7, 1946 shall be subject to mutual agreement after negotiation.

H. The following are added as paragraphs h and i to Section 7 of Article IV-A of Title IV:

h. The Contractor is authorized to prepare such engineering studies as may be requested or approved by the Contracting Officer.

i. The Contractor shall advise and consult with the Contracting Officer charged with the administration of the collateral contracts for the architect-engineering and construction of the facilities added to the Plant (as described in Title I) by Supplement Sixteen to this Contract or for any collateral contracts for architectural and engineering services in procuring or in supervising the installation of any manufacturing and service equipment required therefor.

I. Article IV-B of Title IV is changed to read:

#### Article IV-B—Estimates.

1. a. It is estimated as of the date of the Original Contract that the costs of the work under this Title IV prior to the continued operation covered by the option therefor provided in paragraph a of Section 4 of Articles IV-A hereof will be Twenty-five Million One Hundred Thousand Dollars (\$25,100,000.00) exclusive of the Contractor's fee.

b. It is estimated as of February 13, 1943 that the cost of the work provided for in the option contained in para-



graph a of Section 4 of Article IV-A of this Title IV will be approximately Fifteen Million Eight Hundred Thousand Dollars (\$15,800,000.00), exclusive of the Contractor's fee.

c. It is estimated as of May 25, 1944 that the cost of the work provided for in paragraph b of Section 4 of Article IV-A of this Title IV (third year) will be Twenty-eight Million Three Hundred Three Thousand Dollars (\$28,303,000.00), exclusive of the Contractor's fee.

d. It is estimated as of May 16, 1945, that the cost of the work provided for in paragraph c of Section 4 of Article IV-A of Title IV (fourth year) will be Twenty-nine Million Nine Hundred Eighty-five Thousand Five Hundred Ninety Dollars (\$29,985,590.00), exclusive of the Contractor's fee.

2. It is expressly understood, however, that neither the Government nor the Contractor guarantees the correctness of these estimates. The estimated total costs set forth above are based upon estimates agreed to by both the Government and the Contractor, copies of which are on file in the Office of the Chief of Ordnance.

J. The following is added as Section 5 of Article IV-C of Title IV:

5. A fixed-fee for the work provided for in paragraph c of Section 4 of Article IV-A hereof, in the amount of Three Hundred Fifty Thousand Dollars (\$350,000.00), which fee shall constitute complete compensation for the Contractor's services during such fourth year's operation, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV:

**K. Paragraph m of Section 1 of Article V-A of Title V is changed to read:**

m. In connection with the work under Title IV only, extra compensation to employees, discontinuance wages and charges under welfare and other employee relations plans maintained by the Contractor; Provided that the Government shall be chargeable therefor only insofar as the same are consistent with the general employee relations policies existing throughout the Contractor's organization, or are incurred pursuant to agreement made as a result of collective bargaining with the representatives of employees, or are expressly authorized in writing by the Contracting Officer.

**L. Paragraph (4) is added to paragraph d of Section 3 of Article V-B of Title V to read:**

(4.) The fixed-fee of Three Hundred Fifty Thousand Dollars (\$350,000.00) provided in Section 5 of Article IV-C of Title IV for the fourth year's operation under paragraph c of Section 4 of Article IV-A of Title IV shall be payable in twelve (12) equal monthly installments of Twenty-nine Thousand One Hundred Sixty-six Dollars Sixty-six Cents (\$29,166.66) each. The first such installment shall be payable on the 8th day of July 1945 and a like installment shall be payable on the same day of each of the next succeeding eleven (11) months.

**M. Section 4 of Article V-B of Title V is changed to read:**

4. a. Upon completion of the work under Titles I and II, and under Sections 1, 2 and 3 and paragraphs

5. Paragraph (4) is added to paragraph d of Section a and b of Section 4 of Article IV-A of Title

IV, and again upon the completion of the work under paragraph c of Section 4 of Article IV-A of Title IV, the Government shall pay the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness.

b. Prior to final payment and as a condition thereof the Contractor shall furnish the Government with a release of all claims against the Government arising under and by virtue of this contract, other than (1) such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein, or in estimated amounts where the amounts are not susceptible of exact statement, and (2) any claim based upon responsibility of the Contractor to third parties arising out of the performance of this contract not known to the Contractor at the time of furnishing the release.

c. Even though the existence or amount thereof shall not be determined until after the furnishing of such release as is described next above, reimbursement to be made for payments made by the Contractor shall include, along with wages and salaries otherwise reimbursable, all additional amounts determined (either by approval of the Contracting Officer or by litigation as hereinafter provided) to be due and payable for overtime compensation and allowances under local, state or Federal laws in connection with such wages and salaries.

d. The Contractor shall promptly notify the Contracting Officer of any claims of the type described in para-

graph (2) of paragraph b. of this Section 4 above which are asserted subsequent to the execution of the release.

e. In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith and the costs and expenses of such litigation, including judgments and Court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under the contract. The term "litigation" shall include suits at law or in equity and proceedings before any Governmental agency having jurisdiction over the claim.

N. Article VII-D of Title VII is changed to read:

Article VII-D—Title.

Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to reimbursement under this contract shall vest in the Government upon delivery at the Plant site or at such other point or points as the Contracting Officer may designate in writing; Provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; Provided, further, that upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be respon-



sible for the removal of the rejected property within a reasonable time.

O. The following is added as Section 10 to Article VII-G of Title VII:

10. Upon the happening of loss or destruction of or damage to Government property caused by:

Fire; lightning; windstorm, cyclone, tornado, hail; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; aircraft or objects falling therefrom; vehicles running on land or tracks, excluding vehicles owned or operated by the Contractor or any agent or employee of the Contractor; smoke; sprinkler leakage; earthquake, or volcanic eruption; flood, meaning thereby rising of rivers or streams; enemy attack or any action taken by the military, naval or air forces of the United States in resisting enemy attack,

the contractor shall communicate with the contracting officer and with the Loss and Salvage Organization now or hereafter designated by the contracting officer and, with the assistance of that organization employed by the contractor to perform services in accordance with instructions or regulations of the Government (unless the contracting officer directs that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the contracting officer a statement of: (1) the lost, destroyed and damaged Government property, (2) the time and origin of the loss, destruction or damage, (3) all known interests in commingled property of which the Government property is a part, and (4) the

insurance, if any, covering any part of or interest in such commingled property. If and as directed by the contracting officer, the contractor shall make repairs and renovations of the damaged Government property. The contractor shall be reimbursed the expenditures made by it and approved by the contracting officer in performing its obligations under this Section 10 (including charges made to the contractor by the Loss and Salvage Organization, except any of such charges, the payment of which the Government has, at its option, assumed direct).

P. The provisions of Change Order 10 have been inserted as paragraph h of Article IV-A of Title IV; the provisions of Change Orders 12, 13 and 14 have been incorporated under Titles II and IV; and the provisions of Change Order 15 have been inserted as paragraph c of Section 4 of Article IV-A of Title IV. Therefore, Change Orders 10, 12, 13, 14 and 15 are hereby superseded.

Q. Except as herein provided the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

R. This Supplemental Contract shall be subject to the written approval of the Chief of Ordnance or his duly authorized representative and shall not be binding until so approved.

S. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

None.

In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

**THE UNITED STATES OF  
AMERICA,**

(Sgd.) By **JOHN K. WILLARD,**

(John K. Willard)

Lt. Col., Ord. Dept. Execu-  
tive Officer, Field Direc-  
tor of Ammunition Plants.  
(Contracting Officer ap-  
pointed by the Chief of  
Ordnance.)

**PGP**

(Sgd.) By **O. P. EASTERWOOD, JR.,**

(O. P. Easterwood, Jr.)

Major, Corps of Engineers.  
(Contracting Officer ap-  
pointed by the Chief of  
Engineers.)

**W.M.M.**

**O.F.S.**

**SILAS MASON COMPANY,**

(Contractor)

(Sgd.) By **R. L. TELFORD.**

**P. O. Box 1162,**

**Shreveport, Louisiana.**

**Business Address.**

Two Witnesses as to Execution by the Contractor:

(Sgd.) EDWIN F. ROGGE.

218 Merrick,  
Shreveport, La.  
Address.

(Sgd.) OCTAVA W. ADKINS.

1000 Elm,  
Minden, La.  
Address.

I, R. T. Buffington, certify that I am the Assistant Secretary of the corporation named as Contractor herein; that R. L. Telford who signed this contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Sgd.) R. T. BUFFINGTON,  
Asst. Secretary.

(Corporate Seal)

Parsons/ap.

Change Order No. 17.

Contract No. W-ORD-517.

DA-ORD-4, As Amended.

(Supplement 16 pending.)



Army Service Forces,  
Office of the Chief of Ordnance,  
Field Director of Ammunition Plants,  
St. Louis 8, Missouri.

In reply refer to:  
SPOLY-G,  
Legal Section.

29 June 1945.

Silas Mason Company,  
Louisiana Ordnance Plant,  
Shreveport 1, Louisiana.

Re: Additional Facility Expansion.

Gentlemen:

A site letter has been approved authorizing the modification of Load Line S at the Plant to provide facilities and capacity for loading 405,000 4.2" Chemical Mortar Shell per month.

Therefore, pending the negotiation and execution of a formal supplement to Contract No. W-ORD-517 DA-W-ORD-4, as amended, covering such modification, you are hereby authorized and directed, pursuant to the provisions of Article VII-C of Title VII thereof, to procure such production equipment as is not furnished by the Government, install said equipment and operate said facilities, as may be approved or ratified by the Contracting Officer, as will be necessary to provide for such facility expansion and for the operation thereof.

It is expressly understood and agreed that the work described herein is deemed to be a part of the work under said Contract No. W-ORD-517 DA-W-ORD-4, as amended, and that it shall be governed by all the applicable pro-

visions of said contract, including, without limiting the generality of the foregoing, those pertaining to reimbursement.

The work authorized by this Change Order may involve an appreciable increase in the cost of the work. Therefore, it is understood and agreed that as soon as a detailed estimate of the amount of the work involved is available it will be furnished to the Ordnance Department by the Contractor. Any fixed fee for the foregoing work will be negotiated as a part of said supplement.

Except as hereby changed, the terms and conditions of the Original Contract, as heretofore amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 17.

If this Change Order is satisfactory, please so indicate by signing the three inclosed copies and returning the original and one of the carbon copies of same to this office for conforming and distributing.

For the Chief of Ordnance:

Yours very truly,  
 (S.) JOHN K. WILLARD,  
 (John K. Willard),  
 Lt. Col., Ord. Dept., Executive Officer, Field Director  
 of Ammunition Plants  
 Contracting Officer,

PGP.

Receipt is hereby acknowledged of the above Change Order No. 17 to Contract No. W-ORD-517 DA-W-ORD-4,

dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: July 3, 1945.

**SILAS MASON COMPANY,**  
(Contractor),

(S.) By **R. L. TELFORD,**  
Vice President & General  
Manager.

Due to change in identification system of modifications to contracts, this Change Order is numbered 18, there having been executed Supplements 1, 4, 6, 9 and 16, Modification 11, and Change Orders, 2, 3, 5, 7, 8, 10, 12, 13, 14 and 15.

Parsons/ap.

Change Order No. 18.

Contract No. W-ORD-517.

DA-W-ORD-4, As Amended.

Date: 25 July 1945.

War Department—Ordnance Department,

Change Order to  
Cost-Plus-A-Fixed-Fee,

New Ordnance Facility,  
Construction and Operation Contract.

Contractor: Silas Mason Company, New York, New York.

Name & Location of Plant: Louisiana Ordnance Plant,  
Minden, La.

Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, as amended,

the following additional instructions are hereby issued and the following work is hereby ordered:

1. The Contractor may (but is not obligated), when requested or authorized by the Contracting Officer, extend technical aid and any assistance (including the furnishing of necessary equipment, materials and work forces) in connection with the moving, salvage, demolition, neutralization or other disposition of Government-owned ammunition, explosives, or dangerous chemicals being transported or stored by a carrier.

2. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under this contract, as amended, and that the performance of said work will be done under and in accordance with the applicable provisions of this contract, including, without limiting the generality of the foregoing, those provisions which deal with reimbursement.

3. There is no appreciable change in the estimated cost of the Contractor's services under said contract and no change is made in the fixed-fee. No change in the time of performance is involved.

4. Except as hereby changed, the terms and conditions of said contract, as amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 18.

THE UNITED STATES OF  
AMERICA,

(S.)

JOHN K. WILLARD,

(John K. Willard),

Lt. Col., Ord. Dept., Executive Officer, Field Director  
Ammunition Plants, Contracting Officer.

PGP.



Receipt is hereby acknowledged of the above Change Order No. 18 to Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: July 28, 1945.

**SILAS MASON COMPANY,**  
(S.) By **R. L. TELFORD,**  
Vice President & Gen. Mgr.

Due to change in identification system of modifications to contracts, this Change Order is numbered 19, there having been executed Supplements 1, 4, 6, 9 and 16, Modification 11, and Change Orders 2, 3, 5, 7, 8, 10, 12, 13, 14, 15, 17 and 18.

Mattice/ap.

Change Order No. 19.

Contract No. W-ORD-517.

DA-W-ORD-4, As Amended.

Date: 24 August 1945.

War Department—Ordnance Department,

Change Order to  
Cost-Plus-A-Fixed-Fee,

New Ordnance Facility,  
Construction and Operation Contract.

Contractor: Silas Mason Company, New York, New York.

**Name & Location of Plant:** Louisiana Ordnance Plant,  
Minden, La.

1. Pursuant to the provisions of Article VII-C of Title VII of Contract No. W-ORD-517 DA-W-ORD-4, as amended, the following additional instructions are hereby issued and the following additions to and omissions from the work covered by said contract are hereby ordered:
  - a. You will (1) cease all loading operations immediately in connection with the Louisiana Ordnance Plant except to complete the loading of the materials in process, (2) proceed to do all things necessary to make said Plant safe and free from explosive hazards insofar as is reasonably possible to do so, (3) continue with the operation of the ammonium nitrate graining facilities at Plant, and (4) proceed with the settlement of your subcontracts canceled due to recent schedule cutbacks and/or due to the work ordered omitted hereby (such settlement shall be made subject to the approval of the Contracting Officer).
2. It is expressly understood and agreed that the foregoing is deemed to be part of the work under said Contract W-ORD-517 DA-W-ORD-4, as amended.
3. It is further understood and agreed that the foregoing will cause a material decrease in the amount of the work under said Contract and in the estimated cost of the Contractor's services thereunder. Therefore, an equitable adjustment of the amount of the fixed-fee to be paid the Contractor shall be made and the contract modified by a future supplement thereto accordingly.
4. The Change Order dated 25 July 1945 having been erroneously numbered 17 is hereby correctly numbered 18.

5. Except as hereby changed, the terms and conditions of said contract, as amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 19.

THE UNITED STATES OF  
AMERICA,

(S.)

JOHN K. WILLARD,

(John K. Willard),

Lt. Col, Ord. Dept., Execu-  
tive Officer, Field Director  
Ammunition Plants, Con-  
tracting Officer.

PMM.

JJMcl.

Receipt is hereby acknowledged of the above Change Order No. 19 to Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: September 11, 1945.

SILAS MASON COMPANY,

(S.)

By R. L. TELFORD,

(R. L. Telford),

Vice President.

**NOTICE OF TERMINATION CONTRACT W-ORD-517  
DA-W-ORD-4 AS AMENDED**

**Army Service Forces,  
Office of the Chief of Ordnance,  
Field Directors of Ammunition Plants,  
St. Louis 8, Missouri.**

**4 October 1945.**

**In reply refer to:  
APOLY-G  
Legal Section.**

**Silas Mason Company,  
Louisiana Ordnance Plant,  
Shreveport 1, Louisiana.**

**Attn.: Mr. R. L. Telford.**

**Re: Termination of the Work under Contract W-ORD-517  
—DA-W-ORD-4, Louisiana Ordnance Plant.**

**Gentlemen:**

**Effective midnight, 9 November 1945, the work under  
Contract W-ORD-517 DA-W-ORD-4, as amended, is termi-  
nated for the convenience of the Government.**

**Please execute the acknowledgment of receipt on the  
three inclosed copies and return the original and one of  
the carbon copies to this office.**

**For the Chief of Ordnance:**

**Yours very truly,**

**(S.)**

**JOHN K. WILLARD,  
(John K. Willard).**

**Lt. Col., Ord. Dept., Execu-  
tive Officer, Field Director  
of Ammunition Plants,  
Contracting Officer.**



Receipt is hereby acknowledged of above Notice of Termination to Contract W-ORD-517 DA-W-ORD-4, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: October 9, 1945.

SILAS MASON COMPANY,  
(S.) By R. L. TELFORD.

Due to change in identification system of modifications to contracts, this Change Order is numbered 20, there having been executed Supplements 1, 4, 6, 9 and 16, Modification 11, and Change Orders 2, 3, 5, 7, 8, 10, 12, 13, 14, 15, 17, 18 and 19.

Mattice/ap.

Change Order No. 20.

Contract No. W-ORD-517.

DA-W-ORD-4, As Amended.

Date: 31 October 1945.

War Department—Ordnance Department,

Change Order to  
Cost-Plus-A-Fixed-Fee,

New Ordnance Facility,  
Construction and Operation Contract.

Contractor: Silas Mason Company, New York, New York.

**Name & Location of Plant: Louisiana Ordnance Plant,  
Minden, La.**

1. Effective immediately, the Notice of Termination dated 4 Oct. 1945 to Contract W-ORD-517 DA-W-ORD-4, as amended, is hereby rescinded.

2. Pursuant to the provisions of Article VII-C of Title VII of said contract, the following additional instructions are hereby issued and the following additions to and omissions from the work covered by said contract are hereby ordered:

a. The Contractor is hereby authorized and directed to do all things necessary or convenient to prepare for operation and to operate the ammonium nitrate crystallizing facilities of the Lone Star Ordnance Plant, near Texarkana, Texas, and of the Wolf Creek Ordnance Plant, near Milan, Tennessee, beginning in the case of Lone Star Ordnance Plant, 4 November 1945, and in the case of Wolf Creek Ordnance Plant, 19 November 1945, and continuing as directed from time to time by the Contracting Officer, but, in any event, not beyond 31 December 1945. In such operation Contractor will crystallize ammonium nitrate solution and coat the same, in accordance with the process hereby referred to as the Tennessee Valley Authority Process for ammonium nitrate fertilizer, in such quantities as may be directed from time to time by the Contracting Officer.

3. In carrying out the work under this Change Order, it is expressly understood and agreed that the Contractor is authorized to make use of the existing facilities, utilities and services at the said Lone Star Ordnance Plant and the said Wolf Creek Ordnance Plant, insofar as is reasonably possible, and insofar as may be approved by

the Contracting Officer under this Contract, and by the Commanding Officer of either the Lone Star Ordnance Plant or the Wolf Creek Ordnance Plant, as the case may be.

4. It is expressly understood and agreed by and between the parties hereto that the Contracting Officer's decision as to the proper proportionate share of any costs incurred jointly under this Contract and under the Government operation of the said Lone Star Ordnance Plant and the said Wolf Creek Ordnance Plant by reason of the foregoing, to be charged to this Contract or to the funds appropriated for the Government operation of the said Lone Star Ordnance Plant and the said Wolf Creek Ordnance Plant, shall be final and conclusive upon the parties hereto, subject only to appeal as provided for in Article VII-N of Title VII hereof.

5. The Contractor is authorized to turn over to the Ordnance Department custody and responsibility for the Louisiana Ordnance Plant site, except for the ammonium nitrate area, and custody, responsibility and accountability for all property located thereon, on or about November 9, 1945, or as near thereto as is reasonably possible.

6. It is expressly understood and agreed that the foregoing is deemed to be a part of the work under said Contract W-ORD-517 DA-W-ORD-4, as amended.

7. The work covered by this Change Order involves an increase in the cost of the work under this Contract, as amended through Change Order No. 19. Any fixed-fees for the work covered by this Change Order will be agreed upon by negotiations between the Government and the Contractor prior to the execution of a formal supplement to the said contract covering this work.

8. The Contractor is requested to furnish promptly an estimate of the cost of the work done and to be done under Change Order No. 19 to said contract, dated 24 August 1945, and to be done under this Change Order No. 20. This estimate should include (a) the cost of the work under subparagraphs (1), (2) and (4) of paragraph 1.a. of said Change Order No. 19; (b) the cost of the work under subparagraph (3) of paragraph 1.a. of said Change Order No. 19 through November 9, 1945; and (c) the cost of the work under this Change Order No. 20.

9. It is expressly understood and agreed that the provisions of Change Order No. 7 to said contract, dated February 19, 1944, shall extend to and include the ammonium nitrate crystallizing facilities of the said Lone Star Ordnance Plant and the said Wolf Creek Ordnance Plant, from the dates on which the Contractor begins operations in said areas as provided in paragraph 2.a. hereof.

10. Except as hereby changed, the terms and conditions of said Contract, as amended, shall remain in full force and effect and shall apply with equal force and effect in carrying out the provisions of this Change Order No. 20.

THE UNITED STATES OF  
AMERICA,

(S.)

R. H. STRATTON,

(R. H. Stratton),

PMM

Lt. Col., Ord. Dept., Execu-  
tive Officer, Field Director  
Ammunition Plants, Con-  
tracting Officer.



Receipt is hereby acknowledged of the above Change Order No. 20 to Contract No. W-ORD-517 DA-W-ORD-4, dated July 3, 1941, as amended, and the Contractor hereby accepts the terms and conditions thereof.

Date: November 5, 1945.

**SILAS MASON COMPANY,**  
(S.) By **R. L. TELFORD.**

Due to change in identification system to modifications to contracts this Supplement is numbered 21, there having been executed Supplements 1, 4, 6, 9 and 16, and Change Orders, 2, 3, 5, 7, 8, 10, (Mod. 11 Unilateral), 12, 13, 14, 15, 17, 18, 19 and 20.

Contract No. W-ORD-517 DA-W-ORD-4.

Supplement No. 21:

Cost-Plus-A-Fixed-Fee,

New Ordnance Facility,  
Construction and Operation Contract.

War Department.

Contractor: Silas Mason Company, New York, N. Y.

Place: At or near Minden, Louisiana.

Supplemental Contract: Providing for the estimated cost of the work in ceasing loading operations, decontaminating the Plant, continuing the operation of the ammonium nitrate graining facilities, and certain other work.

Payments to be made by Finance Officer, U. S. Army at New Orleans, Louisiana.

The equipment, supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authority, the available balance of which is sufficient to cover the cost of the same:

605-6035 P120 A212/61005.

(S.)

R. H. STRATTON,

(R. H. Stratton),

Lt. Col., Ord. Dept., Executive Officer, Field Director  
Ammunition Plants, Contracting Officer.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended, the Act approved December 18, 1941 (Public Law 354, 77th Cong.); and Executive Order No. 9001 dated December 27, 1941.

Received 12:30 P. M. Jan. 14, 1946. Silas Mason Co., Shreveport, La.

#### SUPPLEMENTAL CONTRACT.

This Supplemental Contract, entered into this 5th day of December, 1945, by The United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract, and Silas Mason Company, a corporation organized and existing under the laws of the State of Delaware, of the City of New York, in the State of New York, hereinafter called the "Contractor", Witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract dated July 3, 1941, identified by the

Government as Contract No. W-ORD-517 DA-W-ORD-4, and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, the Original Contract has been supplemented and amended by various Change Orders and Supplemental Agreements; and

Whereas, the Contracting Officer, after consultation with the Contractor, by a written order, dated August 24, 1945, and designated as Change Order No. 19 directed the Contractor to omit certain work covered by the said contract, to decontaminate the Plant, to continue with certain work under the said contract; and

Whereas, the Contracting Officer, after consultation with the Contractor, by a written order dated 31 October 1945, and accepted by the Contractor 5 November 1945, and designated as Change Order No. 20, directed the Contractor to operate certain ammonium nitrate crystallizing facilities not previously covered by said contract; and

Whereas, the above mentioned changes caused a material decrease in the amount of the work to be done under the said contract; and

Whereas, the Original Contract, as amended, provides that an equitable adjustment of the amount of the fixed-fees to be paid the Contractor shall be made if such changes cause a material decrease in the amount of the work to be done under the said contract; and

Whereas, the Government and the Contractor, after negotiations have arrived at an agreement as to the estimated cost of the work to be performed by reason of such changes, and the amount of the fixed-fee to be paid therefor; and

Whereas, it has been administratively determined that the foregoing will facilitate the prosecution of the war; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions herein after set out; and

Whereas, the accomplishment of the above described work under a cost-plus-a-fixed-fee contract entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the foregoing;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:

A. Paragraph c. of Section 4 of Article IV-A of Title IV is changed to read:

c. Beginning June 8, 1945, the Contractor shall, as directed from time to time by the Contracting Officer, operate the Plant to August 24, 1945.

B. The following are added as paragraphs d, e and f to Section 4 of Article IV-A of Title IV:

d. Beginning August 24, 1945, the Contractor shall (1) cease all loading operations in connection with the Plant except to complete the loading of the materials in process (2) proceed to do all things necessary to make said Plant



safe and free from explosive hazards insofar as is reasonably possible to do so, and (3) constitute with the operation of the ammonium nitrate graining facilities at said Plant for the production of such quantities as may be directed from time to time by the Contracting Officer for a period ending June 30, 1946.

e. Beginning November 4, 1945, the Contractor shall operate the ammonium nitrate graining facilities of the Lone Star Ordnance Plant, near Texarkana, Texas, for the production of such quantities as may be directed from time to time by the Contracting Officer for a period ending June 30, 1946.

f. Beginning November 19, 1945, the Contractor shall operate the ammonium nitrate graining facilities of the Wolf Creek Ordnance Plant, near Milan, Tenn., for the production of such quantities as may be directed from time to time by the Contracting Officer for a period ending June 30, 1946.

C. The following are added as paragraphs j. and k. to Section 7 of Article IV-A of Title IV:

j. In carrying out the work under Change Order No. 20 to this Contract, dated 31 October 1945, and under paragraphs e. and f. of Section 4 of this Article IV-A, it is expressly understood and agreed that the Contractor is authorized to make use of the existing facilities, utilities and services at the said Lone Star Ordnance Plant and the said Wolf Creek Ordnance Plant, insofar as is reasonably possible, and insofar as may be approved by the Contracting Officer under this Contract, and by the Commanding Officer of either the Lone Star Ordnance Plant or the Wolf Creek Ordnance Plant, as the case may be.

k. It is expressly understood and agreed that the provisions of Change Order No. 7 to this Contract, dated February 19, 1944, shall extend to and include the ammonium nitrate graining facilities of the Lone Star Ordnance Plant and the Wolf Creek Ordnance Plant, from the dates on which the Contractor begins operations in said areas as provided in paragraphs e. and f. respectively of Section 4 of this Article IV-A.

D. Due to the reduction of work under paragraph c. of Section 4 of Article IV-A of Title IV, a reduction in the estimated cost of the work in the amount of Twenty-three Million Five Hundred Seventy-seven Thousand Seven Hundred Ten Dollars (\$23,577,710.00) has been agreed upon. Therefore, paragraph d. of Section 1 of Article IV-B of Title IV is changed to read:

d. It is estimated that the cost of the work provided for in paragraph c. of Section 4 of Article IV-A of Title IV will be Six Million Four Hundred Seven Thousand Eight Hundred Eighty Dollars (\$6,407,880.00), exclusive of the Contractor's fee.

E. The following are added as paragraphs e, f, g and h to Section 1 of Article IV-B of Title IV:

e. It is estimated that the cost of the work provided for in subparagraphs (1) and (2) of paragraph d. of Section 4 of Article IV-A of Title IV will be Eight Hundred Seventy-eight Thousand Seven Hundred Thirty-six Dollars (\$878,736), exclusive of the Contractor's fee.

f. It is estimated that the cost of the work up to and including December 31, 1945, provided for in subparagraph (3) of paragraph d. of Section 4 of Article IV-A of Title IV will be Three Hundred Thirty-one Thousand Two

Hundred Seventy-four Dollars (\$331,274.00), exclusive of the Contractor's fee.

g. It is estimated that the cost of the work up to and including December 31, 1945, provided for in paragraph e. of Section 4 of Article IV-A of Title IV will be One Hundred Fourteen Thousand Five Hundred Dollars (\$114,500.00), exclusive of the Contractor's fee.

h. It is estimated that the cost of the work up to and including December 31, 1945, provided for in paragraph f. of Section 4 of Article IV-A of Title IV will be Forty-six Thousand Five Hundred Dollars (\$46,500.00), exclusive of the Contractor's fee.

F. Due to the reduction of work under paragraph c. of Section 4 of Article IV-A of Title IV a reduction in the fixed-fee in the amount of Two Hundred Seventy-five Thousand Two Hundred Five Dollars Forty-eight Cents (\$275,205.48) has been agreed upon. Therefore, Section 5 of Article IV-C of Title IV is changed to read.

5. A fixed-fee for the work provided for in paragraph c. of Section 4 of Article IV-A hereof, in the amount of Seventy-four Thousand Seven Hundred Ninety-four Dollars Fifty-two Cents (\$74,794.52), which fee shall constitute complete compensation for the Contractor's services from June 8, 1945 to August 24, 1945, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

G. The following are added as Sections 6, 7, 8 and 9 to Article IV-C of Title IV:

6. A fixed-fee for the work provided for in subparagraphs (1) and (2) of paragraph d. of Section 4 of Article



IV-A hereof in the amount of Eighteen Thousand Dollars (\$18,000.00) which fee shall constitute complete compensation for contractor's services under said subparagraph (1) and (2), including profit other than that included in that prices quoted pursuant to Section 8 of Article IV-A of this Title IV.

7. A fixed-fee for the work (through December 31, 1945), provided for in subparagraph (3) of paragraph d. of Section 4 of Article IV-A hereof in the amount of Eleven Thousand Six Hundred Fifty Dollars (\$11,650.00) which fee shall constitute complete compensation for contractor's services under said subparagraph (3), for the period through December 31, 1945, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of Title IV.

8. A fixed-fee for the work (through December 31, 1945), provided for in paragraph e. of Section 4 of Article IV-A hereof in the amount of Five Thousand Three Hundred Fifty Dollars (\$5,350.00) which fee shall constitute complete compensation for Contractor's services under said paragraph e. for the period through December 31, 1945, including profit other than included in the prices quoted pursuant to Section 8 of Article IV-A, Title IV.

9. A fixed-fee for the work (through December 31, 1945), provided for in paragraph f. of Section 4 of Article IV-A hereof in the amount of Two Thousand Dollars (\$2,000.00), which fee shall constitute complete compensation for Contractor's services under said paragraph f, including profit other than that included in the prices pursuant to Section 8 of Article IV-A of Title IV.

H. The following is added as paragraph x. of Section 1 of Article V-A, Title V:



x. Costs and expenses incurred pursuant to the terms of Change Orders No. 19 and 20 dated August 24, 1945 and 31 October 1945, respectively, and accepted by the Contractor September 11, 1945 and November 5, 1945, respectively. Said Change Orders No. 19 and 20 shall cease and terminate for all purposes upon the date of execution of this Twenty-first Supplement, except for the authority heretofore granted the Contractor by the terms of this Contract, and explicitly reiterated in said Change Order No. 19 to proceed with the settlement of all canceled sub-contracts and purchase orders, which authority is hereby continued with the same force and effect as if herein set forth in full and except for the provisions contained in paragraphs 1, 5, 6 and 10 of said Change Order No. 20.

I. The following are added as Sections 9 and 10 to Article V-A of Title V:

9. It is agreed that the Contractor shall receive no fee for the work and services performed under Change Order No. 17 to this Contract.

10. It is expressly understood and agreed by and between the parties hereto that the Contracting Officer's decision as to the proper proportionate share of any costs incurred jointly under this Contract and under the Government operation of the said Lone Star Ordnance Plant and the said Wolf Creek Ordnance Plant by reason of the work provided for in Change Order No. 20 to the Contract, dated 31 October 1945, and in paragraphs e. and f. of Section 4 of Article IV-A of Title IV, to be charged to this Contract or to the funds appropriated for the Government operation of the said Lone Star Ordnance Plant and the said Wolf Creek Ordnance Plant, shall be final and conclusive upon the parties hereto, subject only to appeal as provided for in Article VII-N of Title VII hereof.

J. Paragraph (4) of paragraph d. of Section 3 of Article V-B of Title V is changed to read:

(4) The fixed-fee of Seventy-four Thousand Seven Hundred Ninety-four Dollars Fifty-two Cents (\$74,794.52), provided in Section 5 of Article IV-C of Title IV, for the operation of the Plant during the period provided for in paragraph c. of Section 4 of Article IV-A of Title IV, shall be paid in installments as follows: Twenty-nine Thousand One Hundred Sixty-six Dollars Sixty-six Cents (\$29,166.66) on the 8th day of July 1945, and a like installment on the 8th day of August 1945. The last installment of Sixteen Thousand Four Hundred Sixty-one Dollars Twenty Cents (\$16,461.20) shall be paid upon completion of such work and its acceptance in writing by the Contracting Officer.

K. The following are added as paragraphs (5), (6), (7) and (8) to paragraph d. of Section 3 of Article V-B of Title V:

(5) The fixed-fee of Eighteen Thousand Dollars (\$18,000.00) provided for in Section 6 of Article IV-C of Title IV shall be paid either upon the furnishing by the Contractor to the Government of the release provided for in Section 4 of Article V-B hereof or under a Final Settlement Agreement whichever may be mutually agreed to by the parties.

(6) The fixed-fee of Eleven Thousand Six Hundred Fifty Dollars (\$11,650.00) provided for in Section 7 of Article IV-C of Title IV for operation through December 31, 1945 (at Louisiana Ordnance Plant) shall be paid upon completion of such work and its acceptance in writing by the Contracting Officer.

(7) The fixed-fee of Five Thousand Three Hundred Fifty Dollars (\$5,350.00) provided for in Section 8 of Article IV-C of Title IV for operation through December 31, 1945 (at Lone Star Ordnance Plant) shall be paid upon completion of such work and its acceptance in writing by the Contracting Officer.

(8) The fixed-fee of Two Thousand Dollars (\$2,000.00) provided for in Section 9 of Article IV-C of Title IV for operation through December 31, 1945 (at Wolf Creek Ordnance Plant) shall be paid upon completion of such work and its acceptance in writing by the Contracting Officer.

L. Paragraph a. of Section 4 of Article V-B of Title V is changed to read:

a. Upon completion of the work under Titles I and II, and under Sections 1, 2 and 3 and paragraphs a and b of Section 4 of Article IV-A of Title IV, and again upon the completion of the work under paragraphs c, d, e and f of Section 4 of Article IV-A of Title IV, the Government shall pay the Contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the Contractor. The Contracting Officer shall accept or reject the completed work with reasonable promptness.

M. Except as herein provided, the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

N. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

The following sentence was added to Sections 7, 8 and 9 of Article IV-C of Title IV as set forth in Division G above:

"A fixed-fee for the Contractor's services for the period beginning January 1, 1946 to June 30, 1946 inclusive will be negotiated."

Section 9 of Article IV-C of Title IV as set forth in Division G above is changed to read:

"9. A fixed-fee for the work (through December 31, 1945), provided for in paragraph f. of Section 4 of Article IV-A hereof in the amount of Two Thousand Dollars (\$2,000.00), which fee shall constitute complete compensation for Contractor's services under said paragraph f. for the period through December 31, 1945, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of Title IV. A fixed-fee for the Contractor's services for the period beginning January 1, 1946 to June 30, 1946, inclusive, will be negotiated."

In Witness Whereof, the parties hereto have executed this contract in triplicate as of the day and year first above written.

THE UNITED STATES OF  
AMERICA,

(S.) By R. H. STRATTON,

(R. H. Stratton),

PMM.

Lt. Col., Ord. Dept., Executive Officer, Field Director Ammunition Plants, (Contracting Officer appointed by the Chief of Ordnance).

SILAS MASON COMPANY,

(Contractor),

(S.) By R. L. TELFORD,

Business Address: Shreveport, La.



Two Witnesses as to Execution by the Contractor:

(S.) RUSSEL G. CARR,  
Address: Box 1162,  
Shreveport, La.

(S.) R. L. WILSON,  
Address: Minden, La.

I, R. T. Buffington, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that R. L. Telford who signed this Contract on behalf of the Contract was then Vice-President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(S.) R. T. BUFFINGTON,  
(Corporate Seal) Ass't Secretary.

Due to change in identification system to modifications to contracts this Supplement is numbered 22, there having been executed Supplements 1, 4, 6, 9, 16 and 21 and Change Orders 2, 3, 5, 7, 8, 10 (Mod. 11 Unilateral), 12, 13, 14, 15, 17, 18, 19 and 20.

Contract No. W-ORD-517 DA-W-ORD-4.

Supplement No. 22.

Cost-Plus-A-Fixed-Fee,

New Ordnance Facility,  
Construction and Operation Contract.

War Department.

Contractor: Silas Mason Company, New York, N. Y.

Place: At or near Minden, Louisiana.

Supplemental Contract: Providing for the estimated cost of the work in continuing the operation of the ammonium nitrate graining facilities, and certain other work.

Payments to be made by Finance Officer, U. S. Army at New Orleans, Louisiana.

The equipment, supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following procurement authority, the available balance of which is sufficient to cover the cost of the same:

605-6035 P120 A212/61005.

(S.)

R. H. STRATTON,

(R. H. Stratton),

Lt. Col., Ord. Dept., Executive Officer, Field Director  
Ammunition Plants, Contracting Officer.

This Supplemental Contract is authorized by and negotiated pursuant to the following laws: The Act approved July 2, 1940 (Public No. 703, 76th Cong.), as extended, the Act of March 11, 1941 (Public Law 11, 77th Cong.), as extended, the Act approved December 18, 1941 (Public Law 354, 77th Cong.); and Executive Order No. 9001 dated December 27, 1941.

#### SUPPLEMENTAL CONTRACT.

This Supplemental Contract, entered into this 20th day of December, 1945, by The United States of America, hereinafter called the "Government", represented by the Contracting Officer executing this contract, and Silas Mason Company, a corporation organized and executing under the laws of the State of Delaware, of the City of New York, in the State of New York, hereinafter called the "Contractor", Witnesseth that:

Whereas, there is now in force between the parties hereto a certain contract dated July 3, 1941, identified by the Government as Contract No. W-ORD-517 DA-W-ORD-4, and being hereinafter sometimes referred to as the "Original Contract"; and

Whereas, the Original Contract has been supplemented and amended by various Change Orders and Supplemental Agreements; and

Whereas, the Original Contract, as amended, provides that the Contractor shall continue with the operation of the ammonium nitrate graining facilities at the Louisiana Ordnance Plant for a period beginning August 24, 1945, and ending June 30, 1946; and

Whereas, the Original Contract, as amended, provides that the Contractor shall operate the ammonium nitrate graining facilities of the Red River Ordnance Depot (formerly Lone Star Ordnance Plant) for a period beginning November 1, 1945, and ending June 30, 1946; and

Whereas, the Original Contract, as amended, provides that the Contractor shall operate the ammonium nitrate graining facilities of the Milan Arsenal (formerly Wolf Creek Ordnance Plant) for a period beginning November 19, 1945, and ending June 30, 1946; and

Whereas, the Original Contract, as amended, provides for the estimated cost of the above mentioned work only up to and including December 31, 1945; and

Whereas, the Original Contract, as amended, provides for the amount of the fixed-fees to be paid the Contractor for the above-mentioned work only up to and including December 31, 1945; and

Whereas, the Original Contract, as amended, provides that fixed-fees for the Contractor's services in connection with the above-mentioned work for the period beginning

January 1, 1946 and ending June 30, 1946, will be negotiated; and

Whereas, the Government and the Contractor, after negotiations have arrived at an agreement as to the estimated cost of the work to be performed during the period beginning January 1, 1946, and ending June 30, 1946, by reason of the foregoing, and the amount of the fixed-fee to be paid therefor for the period beginning January 1, 1946 and ending June 30, 1946; and

Whereas, it has been administratively determined that the foregoing will facilitate the prosecution of the war; and

Whereas, the Contractor has agreed to such modifications upon the terms, conditions and provisions herein-after set out; and

Whereas, the accomplishment of the above described work under a cost-plus-a-fixed-fee contract entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and

Whereas, as a result of such negotiations the Secretary of War has directed that the Government enter into a Supplemental Contract with the Contractor for the accomplishment of the foregoing;

Now, Therefore, the parties hereto do mutually agree that the Original Contract, as amended, shall be and is hereby modified in the following particulars:



**A. The following are added as paragraphs i, j and k to Section 1 of Article IV-B of Title IV:**

**i. It is estimated that the cost of the work provided for in subparagraph (3) of paragraph d of Section 4 of Article IV-A of Title IV, for the period beginning January 1, 1946 and ending June 30, 1946, will be Seventy-Two Thousand Three Hundred Seventy-Two Dollars (\$72,372.00) per month, exclusive of the Contractor's fee.**

**j. It is estimated that the cost of the work provided for in paragraph e of Section 4 of Article IV-A of Title IV, for the period beginning January 1, 1946 and ending June 30, 1946, will be Seventy-Four Thousand Three Hundred Fourteen Dollars (\$74,314.00) per month, exclusive of the Contractor's fee.**

**k. It is estimated that the cost of the work provided for in paragraph f of Section 4 of Article IV-A of Title IV, for the period beginning January 1, 1946 and ending June 30, 1946, will be Thirty-Nine Thousand Forty Dollars (\$39,040) per month, exclusive of the Contractor's fee.**

**B. The following are added as Sections 10, 11 and 12 to Article IV-C of Title IV:**

**10. A fixed-fee for the work provided for in subparagraph (3) of paragraph d of Section 4 of Article IV-A of Title IV, for the period beginning January 1, 1946 and ending June 30, 1946, in the amount of Two Thousand Nine Hundred Dollars (\$2,900.00) per month, which fee shall constitute complete compensation for contractor's services under said subparagraph (3), for the period from January 1, 1946 through June 30, 1946, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of Title IV.**

11. A fixed-fee for the work provided for in paragraph e of Section 4 of Article IV-A of Title IV, for the period beginning January 1, 1946 and ending June 30, 1946, in the amount of Two Thousand Nine Hundred Dollars (\$2,900.00) per month, which fee shall constitute complete compensation for Contractor's services under said paragraph e, for the period from January 1, 1946 through June 30, 1946, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of Title IV.

12. A fixed-fee for the work provided for in paragraph f of Section 4 of Article IV-A of Title IV, for the period beginning January 1, 1946 and ending June 30, 1946, in the amount of One Thousand Four Hundred Fifty Dollars (\$1,450.00) per month, which fee shall constitute complete compensation for Contractor's services under said paragraph f, for the period from January 1, 1946 through June 30, 1946, including profit other than that included in the prices quoted pursuant to Section 8 of Article IV-A of Title IV.

C. The following are added as paragraphs (9), (10) and (11) to paragraph d of Section 3 of Article V-B of Title V:

(9) The fixed-fee of Two Thousand Nine Hundred Dollars (\$2,900.00) per month provided for in Section 10 of Article IV-C of Title IV shall be paid as follows. The first such monthly fee to be paid January 31, 1946, and the succeeding monthly fees to be paid on the last day of each of the next succeeding months during which the Contractor continues the operation of the ammonium nitrate graining facilities at the Louisiana Ordnance Plant. It is expressly understood and agreed, however, that in the event the work under subparagraph (3) of paragraph

d of Section 4 of Article IV-A of Title IV should be terminated effective as of a day other than the last day of the month, the last monthly fee shall be prorated on the basis of the number of days of operation following the date on which the last monthly fee prior to the effective date of termination becomes payable.

(10) The fixed-fee of Two Thousand Nine Hundred Dollars (\$2,900.00 per month provided for in Section 11 of Article IV-C of Title IV shall be made as follows: The first such monthly fee to be paid January 31, 1946, and the succeeding monthly fees to be paid on the last day of each of the next succeeding months during which the contractor continues the operation of the ammonium nitrate graining facilities at the Red River Ordnance Depot (formerly Lone Star Ordnance Plant). It is expressly understood and agreed, however, that in the event the work under paragraph e of Section 4 of Article IV-A of Title IV should be terminated, effective as of a day other than the last day of the month, the last monthly fee shall be prorated on the basis of the number of days of operation following the date on which the last monthly fee prior to the effective date of termination becomes payable.

(11) The fixed-fee of One Thousand Four Hundred Fifty Dollars (\$1,450.00) per month provided for in Section 12 of Article IV-C of Title IV shall be made as follows: The first such monthly fee to be paid January 31, 1946, and the succeeding monthly fees to be paid on the last day of each of the next succeeding months during which the contractor continues the operation of the ammonium nitrate grinding facilities at the Milan Arsenal (formerly Wolf Creek Ordnance Plant). It is expressly understood and agreed, however, that in the event the work under paragraph f of Section 4 of Article

IV-A of Title IV should be terminated, effective as of a day other than the last day of the month, the last monthly fee shall be prorated on the basis of the number of days of operation following the date on which the last monthly fee prior to the effective date of termination becomes payable.

D. Except as herein provided, the terms and conditions of the Original Contract, as amended, shall continue in full force and effect and shall apply with equal force to this Supplemental Contract.

E. The following alterations were made in this Supplemental Contract before it was signed by the parties hereto:

None.

Received 7:45 A. M., February 7, 1946, Silas Mason Co., Shreveport, La.

In Witness Whereof, the parties hereto have executed this contract in triplicate as the day and year first above written.

(Sgd.) By R. H. STRATTON,

(R. H. Stratton),

Lt. Col. Ord. Dept. PMM

Executive Officer

Field Director Ammunition Plants.

(Contracting Officer appointed by the Chief of Ordnance).

SILAS MASON COMPANY,

(Sgd.) By R. L. TELFORD,

(Contractor).



Shreveport, La.

Business Address:

Two Witnesses as to Execution  
by the Contractor:

(Sgd.) R. L. WILSON,  
Minden, La.

Address:

(Sgd.) V. W. ANDERSON,  
Shreveport, La.

Address:

I, R. T. Buffington, certify that I am the Assistant Secretary of the Corporation named as Contractor herein; that R. L. Telford who signed this Contract on behalf of the Contractor was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Sgd.) R. T. BUFFINGTON,  
(Corporate Seal) Asst. Secretary:

Received 7:45 A. M., February 7, 1946, Silas Mason Co.,  
Shreveport, La.

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## SUPPLEMENTAL COMPLAINT.

(Title Omitted.)

Now come Harris Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, Harry Johnson and James E. Fitch, complainants in this cause, in an endeavor to comply with the demand of the respondent for a more

definite statement of facts and a bill of particulars, and in that regard shows:

1.

That in Article II of their original complaint, in referring to (1) rules and regulations of the Department of Labor and (2) of the Administrator of the Fair Labor Standards Act, and (3) to the wage classifications and wage scale promulgated, they meant all regulations and interpretative bulletins of the Department of Labor and of the Administrator of the Fair Labor Standards Act, clarifying and explaining the provisions of the act of Congress here invoked, should be considered; and that the law, as there explained, clarified and interpreted, authorized complainants to recover, as claimed in their original complaint.

Wherefore, complainants pray that this, their supplemental complaint, be deemed sufficient and that in due course they have the full relief prayed for in their original complaint, and for general and equitable relief.

TURNER B. MORGAN.

DONALD L. BAKER.

BOOTH, LOCKARD & JACK,

By L. L. LOCKARD,

Attorneys for Complainants.

Filed June 28, 1946.

(Acceptance of Service omitted)

## OPINION OF COURT.

(Titles Omitted.)

DAWKINS, j:

Plaintiffs sued for overtime, penalties and attorneys' fees, which they claim to be due under the Fair Labor Standards Act of June 25, 1938, C. 676, Sec. 16, 62 Stat. 1069 (Title 29 USCA Sec. 216), alleging that they had been employed in interstate commerce and in the production of goods for commerce within the meaning of Section 3 (Title 29 USCA, Sec. 203) of said statute. The complaint admits that plaintiffs were paid all their wages at what appears to have been a very liberal rate for straight time for the hours they worked.

Defendant has moved for summary judgment, for the rejection of the demands, contending that, under the undisputed facts and the law applicable thereto, plaintiffs were neither engaged in commerce nor the production of goods for commerce. In support of its motion, defendant offered the affidavit of its vice-president and general manager, one R. L. Telford, to which was attached the contract between it and the Government covering the operations involved. Telford's affidavit is quoted as follows:

"That Silas Mason Company constructed and later operated the Louisiana Ordnance Plant under the terms of a contract with the United States of America, a copy of which is filed in the proceeding hereinafter mentioned.

"That construction of the Plant under the terms of the said contract began on or about the 7th day of July, 1941, and that operation of the Plant began on or about the 4th day of March, 1942.

"That deponent has been connected with the Silas Mason Company in an official capacity from a time long prior to the execution of the contract, above referred

to, to the present time; that he was General Manager of the work performed by the Company under the said contract from the beginning of the construction to the 9th day of June, 1943; and was both General Manager as above stated, and Vice-President of the Silas Mason Company thereafter until a time subsequent to August 23, 1945, the date of the filing of Civil Action No. 1594 on the docket of the United States District Court for the Western District of Louisiana, Shreveport Division, entitled 'Harris Kennedy, et al., vs. Silas Mason Company.'

"That at all times involved in the complaint of complainants in the proceeding just above mentioned, the premises upon which complainants were employed, the tools and equipment which they were using in their employment, and the property and products with which they dealt in such employment, were all the property of, and belonged to, the United States Government; that the component parts of the shells, grenades, mines, fuses, bombs, and other products with which all of the Complainants dealt were shipped to the Louisiana Ordnance Plant as property of the Government and the finished product, as property of the Government, was, by its direction, shipped out of the said premises for use by its Armed Forces in its War effort in the War with Germany, Japan, Italy, and other Nations; that at all times involved in the proceeding above mentioned, Silas Mason Company was operating the Louisiana Ordnance Plant, Shreveport, Louisiana, under the contract above mentioned, which is a cost-plus-a-fixed-fee contract with the United States Government, and under which contract the United States Government obligated itself to pay the Silas Mason Company a fixed fee for operating the said Plant, plus all expenses in connection with the operation thereof.

"That there were no rules, regulations, wage scales, or wage classifications promulgated for Silas Mason Company requiring that complainants in the above numbered



proceeding be compensated for all hours in excess of 40 at time and one-half and at double time for all work performed on Sundays and Holidays; and there was no custom of Silas Mason Company involving or requiring such compensation to complainants, or persons similarly situated."

The contract is typical of many others that were entered into by the Government preceding and during World War II. The undisputed facts are that defendant, Silas Mason Co., Inc., hereafter called the contractor, agreed to build an ordnance plant near Minden, Louisiana, to train key personnel and to operate the plant in the manufacture of shells and munitions to be used in prosecuting the war. It was what is known as a "cost-plus-a-fixed-fee" arrangement, which meant that the Government was ultimately to reimburse the contractor for all sums spent under the contract. At all times, the title to all property, tools, materials and supplies placed or delivered upon the project was in the United States. However, the latter was not to be directly liable for any of the obligations of the contractor, although everything was to be under the control of the War Department, when necessary to exercise it. All the finished products were shipped out of the plant under the Government's directions for the use of its armed forces and those of its Allies. All employees save those of the War Department were hired and their compensation fixed by the contractor, subject to the veto of the army officer in charge.

The contract was divided into seven titles, and these in turn, into articles and subsections. Title I was headed "Design, Construction and Engineering"; Title II "Procurement of Production Equipment"; and Title III "Training of Key Personnel." Each of these three titles had a subsection labeled "Eight Hour Law and Overtime Compensation" found in Article I-G of Title I, reading as follows:

"No laborer or mechanic doing any part of the work contemplated by this Title I, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this Title I shall be computed on a basic rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this Article a penalty of five dollars shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this Article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of U.S. Code, title 40, Sections 321, 325, 324, and 326, relating to hours of labor, as in part modified by the provisions of Section 5(b) of Public Act No. 671, 76th Congress, approved June 28, 1940, and Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime."

The last articles of Titles II and III (being II-D and III-D) declared that "the provisions of Article I-G (with

respect to the eight hour law and overtime) of Title I shall be applied to the work" under Titles II and III.

It is necessary to consider other acts of Congress enumerated in Article I-G, since none of the claims of either this suit or some twenty others of the same nature arose out of either "design, construction and engineering", "procurement of production equipment", or "training of key personnel."

When we come to Title IV, "Operation of Plant (Optional)", we find that Article IV-A provides:

"7. In carrying out the work under this Title IV the Contractor is authorized and shall do all things necessary or convenient in the operating and closing down of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (*who shall be subject to the control and constitute employees of the Contractor*), the providing of all materials and supplies except such as the Government is to furnish or supply as elsewhere specifically provided herein, the storage of materials and supplies and the finished product to the extent of the storage facilities at said Plant, the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions."

Article IV-D makes applicable provisions of the Walsh-Healy Act of June 30, 1936, 49 Stat. 2036 (Title 41 USCA, Secs. 35-45), but it has no application to these cases. Subsection IV-h-2 recites that "paragraph b of Sec. 1 of this article, IV-D, with respect to wages, is inoperative due to lack of determination by the Secretary of Labor of prevailing minimum wage rates for the industry involved." Subsection b of Section I of Article IV-D, after having declared in subsection a that Silas Mason was "a manufacturer of or a regular dealer in the materials,

supplies, articles, or equipment to be manufactured, or used in the performance of the contract", declared that the provisions of the Walsh-Healey Act should apply to "all persons employed by the contractor in the manufacturing or furnishing of all materials, supplies, articles, or equipment used in the performance of the contract", who shall be paid as provided by that statute. The effect was to first write into and then write out of the contract the Walsh-Healey Act, not as to the operations of the ordnance plant, but as to plants or facilities of the contractor insofar as supplies and materials furnished by it. The other titles and articles of the contract are not pertinent to the issues presented here.

As against the affidavit of Telford and the contract, plaintiffs offered by reference affidavits of Guy W. Harkness, N. K. Kavanaugh and Bryant Hammontrée, former employees of the contractor, submitted in other cases. The pertinent portions of the affidavit of the last mentioned witness, which are typical of all the rest, is quoted as follows:

"That he has personal knowledge of all the facts hereinafter recited in this affidavit.

"That this affiant was first employed by the Silas Mason Company in the construction of the Louisiana Ordnance Plant and began his duties on or about August 24, 1941; that his employment with said company continued from that date until the completion of said plant.

"Affiant further states that during this time when the plant was being constructed, that overtime pay of one and one-half the normal rate was paid and double time was paid for Saturdays, Sundays and holidays, that after the Executive Orders were issued by the President of the United States, that overtime pay of one and one-half



was continued but that double time pay for Sundays and holidays did not apply unless the worker had worked seven consecutive days, under which conditions he then received the double time for the seventh day.

"That this affiant continued to work for Silas Mason Company in the operations of the Louisiana Ordnance Plant in which ammunition, shells, bombs, etc., were manufactured and shipped out of the state and to foreign parts; and also during the time that commercial fertilizer was manufactured and shipped in commerce. That during this period of time all laborers and mechanics were paid a stipulated wage per hour for a forty hour week and were paid one and one-half times their stipulated wage for overtime exceeding 40 hours per week. That this was the common accepted policy of the Silas Mason Company in the construction and operation of the Louisiana Ordnance Plant.

"Affiant further states that the Silas Mason Company was the sole operator of said plant; that their authority covered the hiring and firing of all employees, the actual doing of the work and the manufacturing of the products, and that insurance was carried to cover the men from injury, and that the only part that this affiant knew that the United States Government played at this plant was that they had a force of employees engaged directly by the Government and independent of the Silas Mason Employees, which employees were directly under the Government supervision, were paid by the Government and worked as supervisors, checkers, auditors, and in other capacities. That the Government employees and the Silas Mason employees were entirely separate and were each paid by their respective employers.

"This affiant further states that his checks were signed by Silas Mason through their officials and were drawn on the Silas Mason account in designated banks, and that he received no pay directly from the United States Government."

Of course, if commercial fertilizer was made, sold and shipped in interstate commerce, in sufficient quantities, along with the production of munitions of war for the Government, employees working in that part of the enterprise might be entitled to invoke the provisions of the Fair Labor Standards Act. However, the benefits of that type of employment could be claimed only by those who were so engaged and they would have to allege and prove it. Otherwise, the general principles of law applicable under the contract, the nature of the work and the relationship of the Government thereto would govern. With respect to the statements in those affidavits that overtime had been paid the employees, (which they do not say was paid to these particular employees, or whether it was paid under the first three titles of the contract) this would become important only in event it were found the matter was controlled by the contract and that its meaning was doubtful. In such cases, the manner in which the parties thereto had construed and applied it would help to overcome ambiguity. On the other hand, if, as a matter of law, the Fair Labor Standards Act had no application, such evidence would not help the situation, even if overtime had been paid in some instances. What has just been said applies also to the express provisions as to wages, hours, overtime, etc, dealt with in the first three titles, and omitted in all the rest. In other words, it might be said to be significant that the contract sought to apply the Fair Labor Standards Act to these three titles and hence to relieve from the provisions of that law operations under the fourth and succeeding titles.

It is my view that the issue is simply one of law.

The Act of June 25, 1938, C.676, 52 Stat. 1060, (Tit. 201 - 219 USCA) did the somewhat unusual thing of first announcing findings and then declaring the policy of Congress with respect to labor relations. The findings were (202a) that conditions theretofore existing in "industries engaged in commerce or in the production of goods for commerce" (Emphasis by the writer) produced some five enumerated results, affecting interstate commerce and that (202b) "the policy of sections 201-219 of this title" was "to correct and as rapidly as practicable to eliminate the conditions" so found. Section 203 defines at length the meaning of words, phrases and terms used in the statute. Sub section (a):

"'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."

Subsection (d):

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but *shall not include the United States*, or any state or political subdivision of a state, or any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

Subsection (e):

"'Employee' includes any individual employed by an employer."

**Subsection (h):**

**"'Industry' means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed."**

**Subsection (i):**

**"'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."**

Section 206 of said title prescribes the minimum rates and 207 the maximum hours of labor. The latter declares, in substance, that "no employer shall" require an employee to work more than a specific number of hours (at the time involved here 40) per week "unless such employee" is paid "one and one-half times the regular rate" per hour of his employment.

Section 213 provides certain exemptions but none have application here.

Section 215 makes it unlawful "to transport, offer for transportation, ship, deliver, or sell in commerce x x x any goods in the production of which any employee was employed in violation of Sec. 206 of Sec. 207, x x x or in violation of any regulation or order of the Administrator x x x."

**Section 216 declares:**

**"x x x"**



"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. x x x x x The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Thus it is seen that the entire statute sought to deal with private business and industry, expressly excluding the governments of the United States, of the several states and their subdivisions. In subsection 202(a) the findings of Congress were as to "industries engaged in commerce;" and subsection 203 declares that "'Industry' means a trade, business, industry, or branch thereof, or group of industries in which individuals are gainfully employed." (Emphasis by the writer.)

It can scarcely be said that the activities of a government constitute "industry" within the definition of that word provided by the statute. The primary purpose and excuse for its existence is the government of its people, including their protection from within and without. It does not exist for the purpose of affording gainful employment for anyone. Such officers and employees as are provided, presumably, at least, are to enable it to discharge its duties as a sovereign, and not to carry on a business for profit. Congress, of course, recognized these indisputable principles and confined the provisions of the Fair Labor Standards Act to private industry.

Starting, therefore, from this premise we approach the present cases with a clear duty not only to exclude from application of the statute the business and operations of the Government but with the further settled

jurisprudence that the Government shall not be bound by any such measures unless specifically included by unmistakable terms. *U. S. vs. Hewes*, 26 Fed. Cas. 297; *Dollar Savings Bank vs. U. S.*, 86 U. S. 227.

Now, let us analyze the situation as it existed at this and similar plants. Plaintiffs contend that notwithstanding the circumstances revealed by the contract and the nature of the work performed, both they and the contractor were engaged in interstate commerce and the production of goods for commerce, as much so as if the enterprise had been owned and operated for private gain; while defendant argues that the production and transportation of munitions of war for and by the Government under the circumstances of these cases, regardless of whether they were made from materials which passed from one state to another was not commerce within the meaning of the law, but activities of the Government as a sovereign in the prosecution of war.

Cases from the lower Federal Courts were cited by either side but none of them, to my mind, is conclusive, and I shall not attempt to review them. Had defendant been engaged in the business of manufacturing munitions of war, either as a general proposition, or under contract by which it agreed to produce and sell to the Government, either at fixed prices or at prices to be set from time to time, the situation would have perhaps been different, and the Fair Labor Standards Act as well as other laws pertaining to labor, prices, material, etc. might have come into play. Overtime and other expenses of the producer or manufacturer from whom the Government purchased would simply have been added to the prices which the Government had to pay, just as was done when it purchased materials, supplies, etc. for carrying on the war. In this latter situation both the employers and employees who made the goods, although for the Government, were engaged in commerce, within

the meaning of the law, where the goods moved from one state to another or overseas. On the other hand, in these cases and all others like them where the Government, instead of going into the market and paying for manufactured or raw materials, chose to furnish its own materials and to have its munitions made and shipped from its own plants, paying all expenses in the form of reimbursements to the contractor, plus a fixed fee for the latter's knowledge and skill in the operation of the plants, although declining to become responsible directly for labor, materials or other obligations of the contractor, it is my view that the same did not constitute commerce. Of course, the Fair Labor Standards Act and all other laws did apply to purchases from private concerns of raw materials or unfinished parts and supplies from which the shells and munitions were made, before they were delivered to the Government, and in those cases where they had to move from one state to another for delivery to the Government. At the same time the finished shells and munitions made at the plant were the Government's property at all times and were physically delivered to it there before being shipped to the battlefronts.

I can not conceive that because the Government saw fit to employ a contractor, either individual or corporate, in the emergency of war, to build and operate a factory for the production of war munitions out of its own materials, upon lands bought or condemned, under its sovereign power, that such a course could be said to affect the fundamental fact that the enterprise was wholly that of the Government itself. I believe that this is one of the instances where the Courts should look through forms and consider substance.

However, after reaching what is thus believed to be a correct conclusion as to the inapplication of the Fair Labor Standards Act to these cases, we are confronted with

the fact that the contract or agreement with defendant shows on its face that it was entered into by the War Department under the authority of the Act of July 2, 1940, (Public No. 703, 54 Stat. 712) entitled "An act to expedite the strengthening of the national defense." Pertinent provisions of the act are as follows:

Sec. 1. "That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, x x x for national defense purposes for the fiscal year ending June 30, 1941, x x x (1) to provide for the necessary construction x x x and installation x x x of plants, buildings, facilities, utilities, and appurtenances thereto x x x for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies x x x; and (3) to enter into such contracts x x x as he may deem necessary to carry out the purpose specified in this section."

Subsection (b) of Sec. 1 further provided:

"The Secretary of War is further authorized x x x x to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorization contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, x x x under such terms and conditions as it may deem advisable x x x." (Emphasis by the writer.)



Subsection 1 (c): "Whenever, prior to July 1, 1942, the Secretary of War deems it necessary in the interest of national defense, he is authorized, from appropriations available therefor, to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding 30 per centum of the contract price of such supplies or construction. x x x"

Subsection 4, (b) is quoted as follows:

"(b) Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: Provided, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

Section 5: "The President is authorized x x x (3) to provide for the procurement and training of civilian personnel necessary in connection with the protection of critical and essential items of equipment and material and the use or operation thereof; x x x."

In view of this statute, and the provisions quoted, the question is, whether, within the fair indendment and meaning thereof, the operation of the plant in this case "through the agency of (defendant), a selected, qualified, commercial manufacturer, under contracts entered into with them" placed the plaintiffs within the terms of

subsection 4(b) "of laborers and mechanics employed by the War Department x x x."

Having reached the conclusion (which seems further fortified by the provisions of this statute) that the whole enterprise was that of the Government, notwithstanding the interposition of the defendant as contractor, it would seem to follow, inescapably, that laborers at this plant were in reality employed for the Government, and in their hours of labor, were protected by the quoted provisions of said section 4(b). However, this can not have the result of bringing the matter under the Fair Labor Standards Act. The rights of the plaintiffs and of other "laborers and mechanics" so employed were governed by Section 4(b) of the Act of July 2, 1940, referred to above, which limits the rates for overtime to one and one-half times their regular hourly compensation, and excludes the penalties of an additional equal amount and attorneys' fees.

As to any commercial fertilizer which may have been made at the plant, those employees performing such work, while so engaged, if of sufficient magnitude to form an important part of the enterprise, by proper allegations might invoke the provisions of the Fair Labor Standards Act to the extent only that such fertilizer was involved.

The motion for summary judgment should be denied.

Proper decree should be presented.

Thus done and signed in Chambers at Monroe, Louisiana, on this, the 5th day of November, 1946.

BEN C. DAWKINS,  
U. S. District Judge.

Filed November 6, 1946.

**MOTION FOR REHEARING ON JUDGMENT DENY-  
ING MOTION FOR SUMMARY JUDGMENT.**

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(Titles Omitted.)

Defendant moves the Court for a rehearing upon its  
motion for summary judgment for the following reasons:

1.

That the judgment filed herein on November 6, 1946,  
is contrary to the law and the evidence, but only insofar  
as it denied defendant's motion for summary judgment.

2.

Alternatively, should the Court fail to sustain the mo-  
tion for summary judgment, as to the entire demands  
of the complainants, nevertheless the Court is in error  
in not sustaining the motion insofar as the demands of  
the complainants are for penalties and for attorney's fees.

Wherefore, defendant prays that this motion for a re-  
hearing be granted, and upon rehearing defendant's mo-  
tion for a summary judgment be sustained as to all de-  
mands of the complainants.

Alternatively, should the Court not sustain the motion  
for summary judgment as to all demands, then that  
there should be summary judgment rejecting all de-  
mands for penalties and for attorney's fees.

**COOK, CLARK & EGAN,**  
**By C. D. EGAN,**  
**Attorneys for Defendant.**

**Filed November 16, 1946.**

**AMENDED MOTION FOR REHEARING ON JUDG-  
MENT DENYING MOTION FOR SUMMARY JUDG-  
MENT.**

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(Titles Omitted.)

Defendant amends and supplements its motion for a rehearing on the judgment denying motion for summary judgment by changing the number of Article 2 thereof to Article 3, and by adding thereto Article 2 reading as follows:

**2.**

That in addition to the reasons for a summary judgment set out in the motion itself, defendant now shows that the complaint filed herein alleges the nature of the services performed by each complainant to have been as follows:

Harris Kennedy—Safety Inspector;  
Howard S. Sweatt—Safety Inspector;  
Leonard M. Williams—Chief Shift Process Inspector;  
William S. Jones—Foreman;  
Harry Johnson—Foreman;  
James E. Fitch—Safety Inspector;

that, the said complaint, therefore, affirmatively shows that complainants were neither laborers nor mechanics.

Wherefore, defendant prays that this amended motion be filed and allowed; and further prays that this motion for a rehearing be granted, and upon rehearing defendant's motion for a summary judgment be sustained as to all demands of the complainants.

Alternatively, should the Court not sustain the motion for summary judgment as to all demands, then that there



should be summary judgment rejecting all demands for penalties and for attorney's fees.

COOK, CLARK & EGAN,  
By C. D. EGAN,  
Attorneys for Defendant.

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**ORDER.**

Let the foregoing amended motion for rehearing on judgment denying motion for summary judgment be filed.

Shreveport, Louisiana, December 2d, 1946.

BEN C. DAWKINS,  
Judge, United States District  
Court, Western District of  
Louisiana.

(Certificate omitted.)

Filed December 2, 1946.

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**OPINION OF COURT.**

(Titles Omitted.)

DAWKINS, j.:

After full consideration of the briefs and arguments in support of the motions for a new trial, I am convinced that this and the large number of similar cases filed in this Court, not yet passed upon, can not be de-

terminated by the application of the provisions of the Act of July 20, 1940, (public No. 703), 54 Stat. 712, referred to in the former opinion herein, since no such issue has been raised by the pleadings.

However, there has been no change in my views as to the nature of the business and activities involved. It is still thought that no commerce, as such, was involved, but that the whole enterprise was one of making and delivering to the Government, at the plant of munitions of war, used and to be used, in the prosecution of the global conflict in which this nation was then engaged. For this reason, as well as those announced in the original opinion, the Fair Labor Standards Act has no application.

Insofar as the manufacture of fertilizer is concerned, it is sufficient to say that none of the plaintiffs allege or claim that they were employed or engaged in any such work, but their duties were entirely in connection with the making and handling of munitions of war and the materials out of which they were made.

My conclusion, therefore, on rehearing, is that the defendant is entitled to a summary judgment as prayed for, rejecting the demands of the plaintiffs.

Proper decree should be presented.

Thus Done and Signed in Chambers at Monroe, Louisiana, on this the 24th day of March, 1947.

BEN C. DAWKINS,  
U. S. District Judge.

Filed March 25, 1947.

## DECREE.

(Titles Omitted.)

A motion having regularly been made by the defendant for summary judgment rejecting the demands of the complainants on the ground that defendant is entitled to a judgment as a matter of law;

On reading the complaint, motion for summary judgment filed by defendant, and the affidavit and attachments filed therewith, as well as the counter affidavits filed by reference by complainants, and the Court being of the opinion, for reasons assigned in the written opinions filed herein on November 6, 1946, and March 25, 1947, that the law and the evidence are in favor thereof;

It Is, Therefore, Ordered, Adjudged and Decreed, that the said motion be, and the same is hereby granted, and that judgment be entered herein in favor of defendant, Silas Mason Company, and against the complainants, Harris Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, Harry Johnson, and James E. Fitch, and each of them, rejecting their demands at their costs.

Thus Done and Signed at Monroe, Louisiana, on this the 28th day of March, 1947.

BEN C. DAWKINS,

Judge, United States District  
Court, Western District of  
Louisiana.

Filed March 29, 1947.

**NOTICE OF APPEAL.****(Titles Omitted.)**

Notice Is Hereby Given that Harris Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, Harry Johnson and James E. Fitch, complainants in the above entitled and numbered cause, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit, from the final judgment rendered herein on March 28, 1947, and entered herein on the 29th day of March, 1947.

Thus done and signed at Shreveport, Louisiana, this the 8th day of April, 1947.

**TURNER B. MORGAN,  
BOOTH, LOCKARD & JACK.**

By (Sgd.) **L. L. LOCKARD,**  
Attorneys for Complainants.

204 Ardis Building,  
Shreveport, Louisiana.

I hereby certify that a copy of the above and foregoing notice has been served on opposing counsel, Charles D. Egan, Esquire, of the firm of Cook, Clark & Egan, Commercial National Bank Building, Shreveport, Louisiana, by mailing copy to him on this the 8th day of April, 1947, and that in addition to said service, I have delivered to the Clerk of this Court copy to be used by him in giving notification of the filing of this notice of appeal in accordance with Rule 73(b).

(Sgd.) **L. L. LOCKARD,**  
Of Counsel.

Filed April 8, 1947.



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## COST BOND.

(Titles Omitted.)

Know All Men By These Presents that we, Harris Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, Harry Johnson and James E. Fitch as principals, and Rex Morrisett as surety, are held and firmly bound unto Silas Mason Company, in the full sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Silas Mason Company, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seal and dated this 8th day of April, 1947.

Whereas, lately, at the Fall term of the United States District Court in and for the Western District of Louisiana, in a suit pending in said Court between the said Harris Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, Harry Johnson and James E. Fitch, plaintiffs, and the said Silas Mason Company, defendant, a judgment was rendered against the said plaintiffs, and they have given notice of appeal from said judgment, directed to the defendant as provided by Rule 73 of the Rules of Civil Procedure, and the bond of appeal, covering costs, has been fixed by Rule 73(c) of said Rules of Civil Procedure.

Now, the condition of the above obligation is such that if the said Harris Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, Harry Johnson and James E. Fitch shall prosecute said appeal and answer all costs if the appeal is dismissed, or the judgment, affirmed, or such costs as the Appellate Court may award if the

judgment be modified, then the above obligation to be valid; otherwise to remain in full force and virtue.

**HARRIS M. NEDY,  
HOWARD S. SWEATT,  
L. M. WILLIAMS,  
WILLIAM S. JONES,  
HARRY JOHNSON,  
JAMES E. FITCH,**

By **L. L. LOCKARD,**

Attorney,

Principals.

**REX MORRISETT,**

(Rex Morrisett),

Surety.

State of Louisiana,  
Parish of Caddo.

Before me, the undersigned authority, personally came and appeared Rex Morrisett, to me known to be the party who has signed the above and foregoing bond, as surety thereon, who, being by me first duly sworn, deposes and says: That he is worth, over and above all debts and obligations, in assets that can be subjected to levy under execution, the amount for which he has bound himself in said bond.

That the signatures on the above bond are true and genuine signatures and that affiant signed the same for the purposes therein set out.

**REX MORRISETT.**

Sworn to and subscribed before me on this the 8th day of April, 1947.

**VELMA PRICE,**  
Notary Public.

(Seal)

(Affidavit of Attorney omitted.)

Filed April 8, 1947.

**DESIGNATION BY APPELLANTS.****(Titles Omitted.)**

Now into Court, comes complainants in this cause, Harris, Kennedy, Howard S. Sweatt, L. M. Williams, William S. Jones, Harry Johnson, and James E. Fitch, and move that the clerk include in the record on appeal in this cause the following:

- (1) Complaint.
- (2) Plea of Prescription.
- (3) Amended or Supplementary Complaint.
- (4) Motion for More Definite Statement of Facts and Bill of Particulars.
- (5) Motion for Summary Judgment.
- (6) Opinion of the Court on Motion for Summary Judgment dated 11/6/46.
- (7) Motion for Rehearing on Judgment Denying Motion for Summary Judgment.
- (8) Amended Motion for Rehearing on Motion Denying Motion for Summary Judgment.
- (9) Opinion of the Court of March 25, 1947.
- (10) Judgment of the Court.
- (11) Notice of Appeal.

(12) Cost Bond.

(13) This Designation, and any other pleading or document filed in this record, whether herein listed or not, save and except Motions for Orders granting additional time to plead.

Thus Done and Signed This the 11th day of April, 1947.

TURNER B. MORGAN,  
BOOTH, LOCKARD & JACK.  
By L. L. LOCKARD,  
Attorneys for Complainants-  
Appellants.

(Certificate of service omitted.)

• • • • •

Filed April 11, 1947.



**CLERK'S CERTIFICATE.**

I, PHILIP H. MECOM, Clerk of the United States District Court for the Western District of Louisiana, Fifth Circuit, do hereby certify that the foregoing one hundred and seventy (170) pages contain and form a full, true, correct and complete transcript of the record in a cause entitled Harris Kennedy, et al vs. Silas Mason Company, No. 1594 on the Civil Docket of this Court, as fully as the original of same remains on file and of record in this office, at Shreveport, Louisiana, the said transcript having been prepared in accordance with Designation filed by counsel in said cause, a copy of which accompanies this transcript.

Witness my official hand and the seal of said Court, at the City of Shreveport, Louisiana, on this the 3rd day of May, A. D. 1947.

(Seal)

PHILIP H. MECOM,  
Clerk.

By MINA E. HOLT,  
Deputy Clerk.

[fol. 247] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

**ARGUMENT AND SUBMISSION**

Extract from the Minutes of October 8th, 1947

No. 11976

**HARRIS KENNEDY, et al.**

**versus**

**SILAS MASON COMPANY**

On this day this cause was called, and, after argument by L. L. Lockard, Esq., for appellants, and Charles D. Egan, Esq., for appellee, was submitted to the Court.

[fol. 248] ORDER SETTING CASE FOR SUBMISSION EN BANC AT FORT WORTH, TEXAS, ON NOVEMBER 12, 1947—Filed October 24, 1947

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11976

**HARRIS KENNEDY, et al., Appellants,**

**vs.**

**SILAS MASON COMPANY, Appellee**

Appeal from the District Court of the United States for the Western District of Louisiana

No. 12000

**ST. JOHNS RIVER SHIPBUILDING COMPANY, Appellant,**

**vs.**

**R. A. ADAMS, et al., Appellees**

Appeal from the District Court of the United States for the Southern District of Florida

**ORDER FOR SITTING EN BANC**

Whereas, the above styled and numbered causes are appeals from decisions brought under the Fair Labor

Standards Act against employers who were engaged under cost plus contracts in producing articles for use by the government in its war effort; and

Whereas, in each of said appeals a question material to the decision of the appeal is whether within the meaning of the Fair Labor Standards Act the employees were engaged in the production of goods for commerce; and [fol. 249] Whereas, the three judges to whom the two causes were submitted were not the same; and

Whereas, it is deemed desirable that the question common to both causes should be heard by the full court;

It is ordered that the two causes be set for submission before and be submitted to the court en banc at Fort Worth, Texas, on the 12th day of November, 1947.

It is further ordered that such submission shall be on the oral arguments, records and briefs already submitted, supplemented by such other written briefs, arguments and citation of authorities as any of the parties may desire to present but without additional oral argument.

This 24th day of October, 1947.

(Signed) Saml. H. Sibley, J. C. Hutcheson, Jr., E. R. Holmes, Leon McCord, Curtis L. Waller, Elmo P. Lee.

[fol. 250]

#### ARGUMENT AND SUBMISSION

Extract from the Minutes of November 12, 1947

No. 11976

HARRIS KENNEDY, et al.

versus

SILAS MASON COMPANY

On this day this cause was called for resubmission before the Court en banc, and, after argument by L. L. Lockard, Esq., for appellants, and Charles D. Egan, Esq., for appellee, was submitted to the Court.

[fol. 251] OPINION OF THE COURT: CONCURRING OPINION BY  
SIBLEY, CIRCUIT JUDGE, AND DISSENTING OPINION BY  
HUTCHESON, CIRCUIT JUDGE—Filed December 12, 1947

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

No. 11976

HARRIS KENNEDY, et al., Appellants,

versus

SILAS MASON COMPANY, Appellee

Appeal from the District Court of the United States for the  
Western District of Louisiana

(December 12, 1947)

Before Sibley, Hutcheson, Holmes, McCord, Waller, and  
Lee, Circuit Judges, En Banc

McCord, Circuit Judge:

Silas Mason Company during the late war constructed and operated an ordnance plant at Shreveport, Louisiana, under the terms of a "cost-plus-a-fixed-fee" contract with the United States Government. Plaintiffs sued for over-time, penalties, and attorney's fees, which they claim to be due from the Mason Company under the Fair Labor Stand-[fol. 252] ards Act of June 25, 1938, (c. 676, 52 Stat. 1060, 29 U. S. C. A. 203), alleging that they had been employed in interstate commerce and in the production of goods for commerce within the meaning of Title 29, U. S. C. A., Sec. 203.

The Mason Company moved for a summary judgment, on the ground that the plaintiffs were not covered by the Fair Labor Standards Act, in that neither plaintiffs nor defendant were "engaged in commerce," or in the "production of goods for commerce," within the meaning of the Act. This motion was supported by the affidavit of the Vice President of defendant, to which was attached the contract under consideration. The affidavit in support of the motion for summary judgment sets forth the undisputed facts of the case.



The United States was engaged in a war which challenged the very life of the Nation. The defendant was called in and entered into a contract with the Government to construct for it an ordnance plant at Shreveport, Louisiana; and when such plant was erected, to manufacture munitions of war for the Government. The Government owned the land upon which the ordnance plant was built; it owned the plant; it owned the equipment and the materials which went into the manufacture of the munitions; and when such munitions were finished and ready for use, they were stored in plants and buildings which belonged to the Government, or went immediately to the firing line to be there used by the troops. These munitions never at any time went into or became a part of commerce as defined by the Fair Labor Standards Act. They were not manufactured [fol. 253] for sale, nor were they ever intended or used for commercial purposes. The Mason Company had no interest, financial or otherwise, in the shipment, destination, or delivery of these munitions. It sold nothing in interstate commerce; it delivered nothing in interstate commerce; and it shipped nothing except as an agent or instrumentality for the loading of munitions which already belonged to the United States.

Had the defendant been engaged under its contract in the business of manufacturing munitions of war, either as a general proposition, or under contract by which it agreed to produce and sell to the Government, either at fixed prices, or at prices to be fixed from time to time, then we are of opinion that it would come within the Fair Labor Standards Act. This is not the case here. When viewed in the light of the powers reserved to the Government under this "cost-plus-a-fixed-fee" contract it becomes manifest that the Mason Company was not an independent contractor. The Government at all times supervised both the erection of the plant and the manufacture of the munitions.<sup>11</sup>

• • • Performance of the construction work of the entire project will be under the supervision of the Contracting Officer appointed by the Quartermaster General • • • The Contracting Officer may require the Contractor to dismiss from the work any employee the Contracting Officer deems incompetent or whose retention is deemed to be not in the public interest • • • The Government reserves

We are of opinion that transportation by the Government of Government owned munitions during war for use by its armed forces is not "commerce" within the meaning of the Fair Labor Standards Act. *Divins v. Hazeltine Electronics Corp.*, 163 F. 2d 100; *Barksdale v. Ford, Bacon & [fol. 254] Davis, Inc.*, 70 Fed. Supp. 690; *Lynch v. Embry-Riddle Co.*, 63 Fed. Supp. 992.

The decisions cited by plaintiffs are not in conflict with our conclusion here. *Bell v. Porter*, 159 F. 2d 117, contains language favorable to plaintiffs, but, for aught that appears, in that case the appellants were independent contractors, with power to employ and discharge their employees without let or hindrance. Our case of *Atlantic Co. v. Walling*, 131 F. 2d 518, holds that the Congress in defining "commerce" intended to give to the term the broadest possible meaning, so as "to include such transactions, conditions and relationships as have been heretofore known and acknowledged as constituting commerce in the Constitutional sense." It nowhere holds, or tends to hold, that the transportation during war of Government owned munitions is "commerce" under the Fair Labor Standards Act.

While we have shown that the plaintiffs may not recover under the Fair Labor Standards Act, they are further precluded from recovery for the reason that the contract was entered into by the War Department and the defendant under the authority of the Act of July 2, 1940, (Public No. 703, 54 Stat. 712), entitled "An Act to expedite the strengthening of the National Defense," and both defendant and its employees are governed by the provisions of this Act.<sup>2</sup>

The appellants were working directly under the supervision and control of the Government. Therefore, under [fol. 255] subsection 4(b) of Section 1, of the Act of July

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the right to pay directly to the persons concerned all sums due from the Contractor for labor, materials, or other charges . . . ."

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" . . . . This contract is authorized by the following laws: The Act of July 2, 1940 (Public No. 703, 76th Congress), the Act of March 1, 1941 (Public No. 11, 77th Congress) and the Act of June 30, 1941 (Public No. 139, 77th Congress) . . . ."

2, 1940, under which they were employed and working,<sup>3</sup> they are precluded from claiming overtime compensation under the Fair Labor Standards Act.

Furthermore, if the defendant was an agent or instrumentality of the United States for the production only of munitions of war, whose employees were paid with funds of the United States, whose hiring and firing had to be with the approval of the United States, who worked in a building belonging to the United States, on materials supplied by and belonging to the United States, and who turned out a product that at all times belonged to the United States, which was delivered without any trade or commerce or transportation occurring; then, under sub-paragraph (d) of Sec. 3 (29 U. S. C. A. 203), whereby the United States is excluded from the operation of the Act, the Act would not be applicable.

On the other hand, if the defendant was not an agency or instrumentality of the United States, and if the munitions were articles of commerce within the contemplation of the Act, and if the United States was not the producer of the munitions, and if sub-paragraph (d) of Sec. 3 of the Act, excluding the United States from its operation, is not applicable; then there would seem to be no escape from [fol. 256] the conclusion that since the finished products and all their ingredients are the property of the United States and delivered to it as the ultimate consumer of the goods, the Act, under sub-paragraph (i) of Sec. 3, would still be inapplicable because the term "goods" "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a

• • • • • *Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: Provided, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics • • • •*

producer, manufacturer or processor thereof." Since the Government is the ultimate consumer, and since the goods were delivered into its actual physical possession as ultimate consumer, any movement of the goods thereafter by the ultimate consumer over state lines would not relate back and take the goods out of the exception of sub-paragraph (i) of Sec. 3 of the Act. *Divins v. Hazeltine Electronics Corp.*, 163 F. 2d 100.

These employees were put in the munition factories by governmental command on the theory that they were an integral part of the war machine—not because they were an essential part of interstate commerce. We are unwilling, by judicial fiat, to fasten shackles on the nation's feet as it marches to war, nor otherwise to hinder the Government in the exercise of the sovereign function of providing for the common defense unless we are convinced beyond doubt that the commands of Congress inexorably require it.

We find no reversible error in the record and the judgment is therefore Affirmed.

[fol. 257] SIBLEY, Circuit Judge, concurring:

I concur in the judgment of affirmance. If a private corporation had furnished the factory, all tools, and materials, agreed to pay all costs of production plus a fixed fee for goods produced, and exercised the control that the government did in this case, I would have no trouble in holding that the operation was that of the private corporation, and that the contractor was not an independent contractor. As in the case of *St. Johns River Shipbuilding Co. vs. Adams*, — Fed. (2) —, decided herewith, I would prefer to pass over the question of independent contractor, to the question of whether commerce was involved. All the overtime sued for here was earned, if at all, during 1944 and 1945, when the war effort was at its peak, and munitions were produced for immediate use, and under the greatest pressure. I do not think that the government would have committed the business folly of making cost-plus contracts otherwise. As is shown by several Acts passed during the emergency period relating to wages and overtime, all of which deny double damages and attorneys fees where time and a half pay for overtime is provided for, as well as by the retrospective Portal to Portal Act, the United States did not contemplate becoming the penalized



person through cost-plus contracts. While haste was foremost, and cost secondary, I think it clear that no one concerned thought that the work was work in commerce or in producing goods for commerce, or would fall under the peace time Fair Labor Standards Act. Certainly "substandard wages" did not prevail in these public war projects. If the Constitution had vested the war power [fol. 258] in the federal government, and left the regulation of commerce to the States, so that an Act like the Fair Labor Standards Act had been enacted by the States, no one would contend that the war power was circumscribed by the States' commercial legislation. That is because war is not commerce. This case deals with war and not commerce.

**HUTCHESON, Circuit Judge, dissenting:**

I am wholly unable to see how our holding, that appellants, the employees of the Silas Mason Company, were within the coverage of the Fair Labor Standards Act, could possibly be "by judicial fiat, to fasten shackles on the nation's feet while it marches to war, nor otherwise to hinder the Government in the exercise of the sovereign function of providing for the common defense". Standing solitary and alone among my brethren, I hereby disclaim for my brief dissent any purpose to do so.

As I read and understand the Fair Labor Standards Act, it was not enacted to, it does not, fasten shackles on the feet of any. Rather it was enacted to strike from the feet of those who toil the shackles of substandard wages. Sec. 203—Definitions—described "employer" and "employee", "commerce" and "goods" in the widest terms. It does, indeed, exclude from the definition of "employer" the United States, the states or political subdivisions of the states. But there is nothing in it which excludes from the definition "employer" independent contractors producing goods under contract with the United States. Because of its fundamentally remedial purpose and the broad [fol. 259] language it uses, the act should be, it generally has been, construed to give the widest coverage its language will permit:

A study of the record in this case leaves me in no doubt: that the appellants were not employees of the United States; that, on the contrary, they were employees of an independent contractor working under contract with

the United States; that the munitions they were producing were "goods" within the definition of goods as used in the act; and that, unless it can be said that these goods were not being "produced for commerce" within the act's definitions, appellants cannot justly be denied the coverage they seek.

As the act defines it, "Commerce means trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof". I ask upon what permissible theory can it be claimed that appellants are not covered here, when it is conceded that had they been working for a private plant which made munitions for sale and delivery to the United States for war, they would have been. The munitions in both cases would be for purposes of war and not of ordinary trade, but in both cases they would have been produced for transportation from a state to a place outside thereof.

If the United States, as the employer, had manufactured these munitions, certainly appellants would have no standing to invoke the Fair Labor Standards Act, for the very definition of employer excludes the United States. Here the whole elaborate system was designed and operated so that the United States should not be the employer. [fol. 260] This being so beyond question, I find myself wholly unable to agree that employees of Silas Mason Company are not under the act merely because instead of producing ships and clothes and uniforms for use of the armed forces, they were producing munitions.

The briefs of the parties and the briefs filed *amicus curiae* by the Administrator of the Wage and Hour Division have brought forward and discussed all of the applicable decisions. It will advantage no one for me to pile Pelion upon Osa in further citing and discussing them. It will be sufficient for me to say that I find myself in complete agreement with the views expressed in *Bell v. Porter*, 159 F. (2) 117, and that nothing in this case has caused me to withdraw in the slightest from the pronouncements in the opinion of this court in *Atlantic Company v. Walling*, 131 Fed. (2) 518. Standing then not wrapped in the solitude of my own originality but on the solid ground those opinions afford, I can see no reason for isolating appellants from the general mass of em-

ployees in war plants and, because they produced munitions, excluding them from the benefits and protection of the Fair Labor Standards Act. I think the judgment should be reversed. I respectfully dissent from its affirmance.

[fols. 261-268]

**JUDGMENT**

Extract from the Minutes of December 12, 1947

No. 11976

**HARRIS KENNEDY, et al.**

**VERSUS**

**SILAS MASON COMPANY**

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Harris Kennedy, and others, and the surety on the appeal bond herein, Rex Morrisett, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Sibley, Circuit Judge, concurs."

"Hutcheson, Circuit Judge, dissents."

**PETITION FOR REHEARING—Filed December 27, 1947**

[fol. 269]

**ORDER DENYING REHEARING****Extract from the Minutes of January 15, 1948****No. 11976****HARRIS KENNEDY, et al.****VERSUS****SILAS MASON COMPANY**

**It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.**

**"Hutcheson, Circuit Judge, dissents."**

[fol. 270]

**CLERK'S CERTIFICATE****UNITED STATES OF AMERICA:****UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT**

**I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 247 to 269 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11976, wherein Harris Kennedy, et al., are appellants, and Silas Mason Company is appellee, as full, true and complete as the originals of the same now remain in my office.**

**I further certify that the pages of the printed record numbered from 1 to 246 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.**

**In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 19th day of January, A. D. 1948.**

**Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal.)**





[fol. 271] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 8, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5487)









**FILE COPY**

U.S. - Supreme Court, U. S.

**FILED**

**FEB 13 1948**

**SUPREME COURT OF THE UNITED STATES**

**No. 590**

**HARRIS KENNEDY, ET AL,**

**Petitioners**

**VERSUS**

**SILAS MASON COMPANY,**

**Respondent**

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

**LEONARD LLOYD LOCKARD**  
**Attorney for Petitioners**



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**SUPREME COURT OF THE UNITED STATES**

No.

**HARRIS KENNEDY, ET AL,**

### Petitioners

**VET 8148**

**SILAS MASON COMPANY,**

**Respondent**

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioners, Harris Kennedy, Howard Sweatt, L. M. Williams, William S. Jones, Harry Johnson and James E. Fitch, praying for writ of certiorari, respectfully show:

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners (not firemen) sued for overtime, penalties, and attorneys' fees, said to be due them under the

Fair Labor Standards Act of June 25, 1938 (c-676, 52 Stat. 1060, 29 U.S.C.A. 201), by the Silas Mason Company, a "cost-plus-a-fixed-fee" contractor with the United States Government. The Silas Mason Company firstly constructed an ordnance plant for the Government, after which it operated this facility for the Government under the conventional wartime "cost-plus-a-fixed-fee" contract, and it was during the operation of this facility, in making munitions for war, that petitioners worked.

A motion for summary judgment was filed by the Silas Mason Company (R-19), setting out that the plant belonged to the Government, the title to the raw materials processed into munitions was at all times in the Government, and that Silas Mason Company shipped out these munitions upon orders of the Government, for the prosecution of the war by the Government and its allies. The contract with the Government was attached, from which it was apparent that this was the standardized wartime "cost-plus-a-fixed-fee" contract. At this plant, petitioners engaged in the manufacture, fabrication, and loading of shells, munitions, bombs and other materials and products, which were shipped out of the state of Louisiana during the conduct of the war (R-2, 21). Petitioners' work related to the manufacture of these munitions (R-3, 21). The plant and equipment used in the products, activities, as well as goods worked on, were the property of the United States (R-21); and the contract, pursuant to which the Silas Mason Company constructed and operated the plant, refers to the Silas Mason Company as a contractor and

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provides that the contractor is the manufacturer of, or a regular dealer in, the materials, supplies, articles or equipment to be used or manufactured, in the performance of the contract (R-48). The contract provides that petitioners and other employees "shall be subject to the control and constitute employees of contractor" (R-45, 113). The contractor was to receive specified fees from the contract in addition to reimbursement for costs (R-21), but the contract provided for renegotiation of these fees "to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits" (R-128-c). The contract contemplated compliance by the Silas Mason Company with various federal and state regulatory statutes applicable to private employers, such as complying, in appropriate situations, with the Eight Hour Law (R-38, 39, 40, 41, 43) and with the Walsh-Healey Act (R-47, 51, 116). Compliance with the Social Security Act was required because included among the reimbursable costs (R-54). The Silas Mason Company was required to adhere to local Workmen's Compensation Laws and to "procure all necessary permits and licenses, obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory or subdivision thereof wherein the work is done, or of any other duly constituted public authority" (R-75). The Silas Mason Company bought the raw materials in the open market, but under the contract (R-73) it was stipulated that title vested in the Government from the moment of acquisition by the Silas Mason Company.

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The district judge granted the motion for summary judgment upon the theory that the munitions worked on by the petitioners for transportation outside the state of Louisiana did not constitute interstate commerce, within the meaning of the Fair Labor Standards Act, because the goods were the property of the United States during their manufacture and interstate transportation (R-232, 239).

The Fifth Circuit Court of Appeals affirmed by an en banc court, Judge Hutcheson dissenting. Besides agreeing with the district judge that the petitioners were not engaged in the production of goods for commerce, the Fifth Circuit Court of Appeals additionally held that the Silas Mason Company was not an *independent contractor*, because the Government exercised a continuing supervision over the manufacture of the munitions. (R-251)

Additionally, the Fifth Circuit Court of Appeals held that this contract between the Silas Mason Company and the Government, being under the authority of Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, entitled "An Act to Expedite the Strengthening of National Defense"), petitioners were therefore *actually employees of the War Department*.

It was also held, by the Fifth Circuit Court of Appeals, that the United States would be exempt in the situation presented here, under sub-paragraph "i" of Section 3 of the Fair Labor Standards Act, which exempts from the operation of the Act "goods after their delivery into the actual physical possession of the ultimate consumer there-



of, other than the producer, manufacturer, or processor thereof".

A rehearing was timely filed but same was refused, without written opinion, Judge Hutcheson again dissenting (R-262).

**JURISDICTION.**

The original judgment of the Fifth Circuit Court of Appeals was entered December 12, 1947 (R-251); the per curiam refusing rehearing was rendered on January 15, 1948 (R-269).

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code as amended by Act of February 13, 1925 (Title 28, U.S.C.A. 347).

**QUESTIONS PRESENTED.**

The questions presented are:

1. Whether munitions produced in a Government facility by a "cost-plus-a-fixed-fee" contractor with the Government, for shipment out of the United States, for use by the Government and its allies in the prosecution of the late war, are "commerce" within the meaning of the Fair Labor Standards Act.

2. Whether munitions of war, produced in a facility belonging to the Government, by a "cost-plus-a-fixed-fee" contractor, from raw materials, title to which was always in the Government, were goods within the "ultimate consumer" provisions of sub-paragraph "1" of Section 3 of the Fair Labor Standards Act.

3. Subsidiary to the question immediately above is whether or not the *merely constructive* possession which the Government had of these raw materials, as they were being processed, was a sufficient compliance with the "actual physical possession" requirement of the ultimate consumer provision to create the exemption.

4. Whether, under the circumstances presented here, petitioners were actually employees of the War Department of the United States and thus entitled to such benefits as related to overtime provided by the Act of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A. 189-a).

5. And the question, subsidiary to the question immediately above, whether petitioners were laborers and mechanics, within the meaning of the Act of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A., 189-a).

6. Whether or not the Silas Mason Company, under the circumstances presented here, was an independent contractor, or merely an agency of the United States.

7. The Court, in resolving against the presence of "commerce", looked to the ultimate purpose of, or the end use of, the munitions; and finding that to be "war", and that "war" and "commerce" are not synonymous, it decided against the presence of "commerce". A question presented is whether a test permitted by the Act is the ultimate use or purpose of the product manufactured.

## REASONS FOR GRANTING WRIT.

Petitioners assign as reasons for the issuance of a writ of certiorari the following:

1. The issues presented are of outstanding public importance, due to the fact that much government material was produced during the war by "cost-plus-a-fixed-fee" contractors, under identical or similar conditions; and, as a result thereof, there are scores of cases involving hundreds, if not thousands, of litigants, presenting the problems here; and it is of prime importance that the issues be clarified by an authoritative decision of this Court.

2. The decision rendered herein by the Fifth Circuit is contrary to the decision of the Seventh Circuit, in the case of *Bell v. Porter*, 159 F. 2d 117, where the Court specifically held that munitions produced under like circumstances were commerce, within the meaning of the Fair Labor Standards Act.

3. The decision below is in conflict with relevant decisions of this Court, in its holding that a "cost-plus-a-fixed-fee" contractor, engaged in the production of munitions, was a mere agency of the United States Government, conflicting with the decisions of this Court in the cases of *Alabama v. King and Boozer*, 310 U. S. 1; *Buckstaff Company v. McKinley*, 308 U. S. 358; *Curry v. U.S.*, 314 U. S. 14; *Penn Dairies v. Milk Control Commission*, 318 U. S. 361.

4. The Fifth Circuit has held that this "cost-plus-a-fixed-fee" contract, similar to all others entered in-

to by the Government during the war, was not governed quoad the workers by the provisions of the Wage & Hour Law, but, to the contrary, by the Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A., 189-a), holding, in effect, that these employees were employees of the War Department of the United States. This is the first time any court has said this. Thus there is presented the important issue as to whether war workers, under a "cost-plus-a-fixed-fee" contractor, are entitled to the benefits of the Wage & Hour Law.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case No. 11,976, entitled on its docket "*Harris Kennedy, et al, Appellants, versus Silas Mason Company, Appellee*", and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and for such other relief as the Court may deem proper.

LEONARD LLOYD LOCKARD  
Attorney for Petitioners.  
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# MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

*May it please the Court:*

The decision of the Circuit Court of Appeals has not been reported but begins at page 251 of the record. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U.S.C.A., 347).

A statement of the case is found at pages 1 to 5 of the foregoing application.

## ASSIGNMENT OF ERRORS

1. The Court below erred in finding that commerce was not involved in this case within the meaning of the Fair Labor Standards Act Law;
2. The Court erred in its conclusion that the munitions of war involved herein were not "goods" within sub-paragraph "i" of Section 3 of the Fair Labor Standards Act;
3. The Court erred in concluding that the employees of a "cost-plus-a-fixed-fee" contractor producing munitions for the United States Government, were not covered by the Fair Labor Standard Act but by provisions of Act of July 2, 1940, (Public 703, 54 Stat. 712, 5 U.S.C.A. 189a;
4. The Court erred in its conclusion that Silas Mason Company, respondent, was a mere agency of the Government of the United States;

5. The Court erred in looking to the end use or ultimate purpose of the goods produced as a test under the Fair Labor Standards Act, no such definition being set out or implied in the act;

6. The Court erred in concluding that merely commercial transactions were within the ambit of the Act.

### ARGUMENT.

#### 1.

The public importance of the issues presented by this application can scarcely be overstated. During the last war the government expended forty billion dollars of its total war effort to obtain war supplies through the medium of "cost-plus-a-fixed-fee" contracts similar to that in this case (see report of the Judiciary Committee in connection with the Portal to Portal Act of 1947). Out of that immense business have arisen multitudes of claims like the one asserted here, and the lower federal courts are now busily engaged in the disposition of them. These cases are being variously decided in the United States District Courts and in the state courts. This Court has had to deal with cases arising out of similar circumstances as manifested in the case of *Armour & Co. v. Wantock*, 323 U. S. 126, and the case of *Skidmore v. Swift & Co.*, 323 U. S. 134. Among the cases involving similar issues that are, or have been, in the United States District Courts and the state courts, we refer to:

*Umthun v. Day & Zimmerman, Inc.*, 16 N.W.  
(2d) 258.

*Timberlake v. Day & Zimmerman, Inc.*, 49 F.  
Supp. 28.

*Lasater v. Hercules Powder Co.*, 7 W.H.  
Cases 150.

*Adams v. St. Johns River Shipbuilding Co.*, 69  
F. Supp. 989.

*Barksdale v. Ford, Baker & Davis*, 70 F. Supp.  
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*Deal & Co. v. Leonard*, 196 S.W. (2d) 991.

*Steward v. Kaiser Co.*, 71 F. Supp. 551.

*Anderson v. Federal Cartridge Corp.*, 7 W.H.  
Cases 1.

*Matlock v. Sanderson & Porter*, 6 Wage Hour  
Report 917.

*Crabb v. Welden Bros.*, 65 F. Supp. 369.

This is simply illustrative. The issues thus raised here are alive—current, and a decision by this Court would be most useful in the administration of the law.

2.

The United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Bell v. Porter*, 159 F. (2d) 117, did squarely reach a position on the issue of "commerce" directly contrary to the position reached by

the Fifth Circuit in this case. It therefore seems that a writ should be granted herein in order to resolve this conflict between the circuits. We observe, of course, that this Court, after granting a writ of certiorari in the *Bell v. Porter* case, did later reverse its position and recall the writs without a hearing (67 S. Ct. 1092). But we note that in this case, while the circuit court found with complainants on the issue of "commerce", it found against them on the merits, holding that sleeping time of firemen was not work time within the meaning of the Wage & Hour Law (petitioners were not firemen). We have no way of knowing whether that or other reasons actuated this Court in recalling the writs without a hearing, but we make bold to suggest, as illustrative of the need of clarifying this law, that if *Bell v. Porter* had been taken and decided, this application and others, doubtless being made and to follow, would be unnecessary.

### 3.

Moreover, the contract with Silas Mason Company here was typical (see opinion of the District Judge in this case, R-222) of the multitude of other "cost-plus-a-fixed-fee" contracts entered into by the government, aspects of which this Court has considered. While not precisely presenting the same issues, the decision below is apparently contrary to the ruling of this Court that "cost-plus-a-fixed-fee" contractors are not agents or instrumentalities of the United States, particularly the following cases:



*Alabama v. King and Boozer*, 310 U.S. 1.

*Buckstaff Co. v. McKinley*, 308 U.S. 358.

*Curry v. U.S.*, 314 U.S. 14.

*Penn Dairies v. Milk Control Commission*, 318 U.S. 361.

The decision of the court that the controlling law was the Act of July 2, 1940 (Public No. 703, 54 Statutes 712, 5 U.S.C.A. 189-a, entitled "An Act to Expedite the Strengthening of National Defense") was an extremely important ruling, the effect being that the Wage & Hour Law of 1938 was superceded and set aside as to employees of the "cost-plus-a-fixed-fee" contractor for the government. This is the first time this view has been projected by any court. It presents an important problem connected with interpretation of the Wage & Hour Law. If, indeed, on this point the Fifth Circuit is correct, it would be dispositive of the great mass of cases with identical issues now moving through the federal courts.

This Act of July 2, 1940 provides, in Section 4 thereof, only for "laborers and mechanics". Petitioners are described as being either safety inspectors or foremen, not in the category of laborets and mechanics.

*Swisher v. U.S.*, 57 Ct. Cl. 123.

*Gordon v. U.S.*, (1896) 31 Ct. Cl. 254; (1908) 26 Op. Att. Gen. 404.

*Sim v. State*, 254 N.Y.S. 150, 151; 142 Misc. 159.

*Finerty v. Bryan, Ind.*, 16 N.E. (2d) 882, 883.

If not within the category of laborers and mechanics, was this Act of July 2, 1940 a mere pro tanto repeal of the Wage & Hour Law, or did it make the Wage & Hour Law completely unavailable in the situation we have here? Those are issues that only this Court can resolve with such finality as to set litigation at rest.

5.

Finally, the Court of Appeals took the view that, as these munitions were made for war, which might be the very antithesis of commerce, there was no commerce within the meaning of the Wage & Hour Law. In that connection the Fifth Circuit set up and invented a wholly arbitrary standard not supplied by the Act. Implicit in that decision is the notion that to be commerce the product manufactured must be for "trade and traffic", and that alone. The definition in the Wage & Hour Law is much broader. The narrow conception of commerce as being confined to trade and traffic has, in other situations, been rejected by this Court, e.g. *Caminetti v. U.S.*, 242 U.S. 470; 37 S. Ct. 192 (women for immoral purposes); *Champion v. Ames*, 188 U.S. 321; 23 S. Ct. 321 (lottery tickets); *Reid v. Colorado*, 187 U.S. 137; 23 S. Ct. 92 (diseased stock); *United States v. Hill*, 248 U.S. 420; 39 S. Ct. 143 (intoxicating liquors); *Brooks v. U.S.*, 267 U.S. 432; 45

*S. Ct. 345* (stolen automobiles); *Gooch v. U.S.*, 297 U.S. 124; 56 S. Ct. 393 (kidnapped persons). There is nothing in the history of the Wage & Hour Law, nor in the Act itself, that suggests that only commercial transactions are within the ambit of the Act.

WHEREFORE, petitioners respectfully pray that certiorari be granted.

Respectfully submitted,

LEONARD LLOYD LOCKARD  
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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 590

HARRIS KENNEDY, ET AL,

Petitioners

versus

SILAS MASON COMPANY,

Respondent

On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Fifth Circuit

ORIGINAL BRIEF OF PETITIONERS.

LEONARD LLOYD LOCKARD  
Attorney for Petitioners



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# **SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

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**No. 590**

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**HARRIS KENNEDY, ET AL,**

**Petitioners**

*versus*

**SILAS MASON COMPANY,**

**Respondent**

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**On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Fifth Circuit**

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## **ORIGINAL BRIEF OF PETITIONERS.**

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This case is pending here on writ of certiorari granted by this Honorable Court to review the final judgment in a civil case of the United States Circuit Court of Appeals for the Fifth Circuit.

## **OPINION OF THE COURT BELOW**

The original judgment of the Fifth Circuit Court of Appeals was entered December 12th, 1947 (R-251), and

rehearing was refused, without opinion, January 15th, 1948 (R-269). The opinion is reported in 164 F. (2d) 1016.

### **JURISDICTION OF THIS COURT.**

Jurisdiction was invoked under Section 240(a) of the Judicial Code, as amended (28 U.S.C.A., Section 347). Jurisdiction was urged: (1) Because of the paramount public importance of the issues raised, requiring interpretation of provisions of the Fair Labor Standards Act involved in a multitude of cases now pending in the lower federal courts; (2) because of the conflict between the decision of the Seventh Circuit Court of Appeals, in *BELL vs. PORTER*, 159 F. (2d) 117, and the decision below; and (3) the apparent conflicts between the decision below and relevant decisions of this Court, viz.: *ALABAMA v. KING & BOOZER*, 314 U.S. 1; *BUCKSTAFF CO. v. MCKINLEY*, 308 U.S. 358; *CURRY v. UNITED STATES*, 314 U.S. 14; *PENN DAIRIES v. MILK CONTROL COMM.*, 318 U.S. 261.

Because the case is so plainly within the letter of the Statute and the Rules of the Court governing this discretionary jurisdiction, because the Court apparently has not postponed any question of jurisdiction, and because opposing counsel has informally notified us that he proposes no challenge to the jurisdiction, further discussion of this point is not, at this stage, deemed necessary, and is withheld.

### **SUMMARY STATEMENT OF THE CASE.**

Petitioners (not firemen) sued for overtime, penalties, and attorneys' fees, said to be due them under the



Fair Labor Standards Act of June 25, 1938 (c-676, 52 Stat. 1060, 29 U.S.C.A. 201 et seq.), by the Silas Mason Company, a cost plus a fixed fee contractor with the United States Government. The Silas Mason Company firstly constructed an ordnance plant for the Government, after which it operated this facility for the Government under the conventional wartime cost plus a fixed fee contract, and it was during the operation of this facility, in making munitions for war, that petitioners worked.

A motion for summary judgment was filed by the Silas Mason Company (R-19), setting out that the plant belonged to the Government, the title to the raw materials processed into munitions was at all times in the Government, and that the Silas Mason Company shipped out these munitions upon orders of the Government, for the prosecution of the war by the Government and its allies. The contract with the Government was attached, from which it was apparent that this was the standardized wartime cost plus a fixed fee contract. At this plant, petitioners engaged in the manufacture, fabrication, and loading of shells, munitions, bombs, and other materials and products, which were shipped out of the State of Louisiana during the conduct of the war (R-2, 21). Petitioners' work related to the manufacture of these munitions (R-3, 21). The plant and equipment used in the production activities, as well as goods worked on, were the property of the United States (R-21); and the contract, pursuant to which the Silas Mason Company constructed and operated the plant, refers to that Company as a contractor and provides that the contractor is the manufacturer of, or

a regular dealer in, the materials, supplies, articles or equipment to be used or manufactured, in the performance of the contract (R-48). The contract provides that petitioners and other employees "shall be subject to the control, and constitute employees of, contractor" (R-45, 113). The contractor was to receive specified fees from the contract, in addition to reimbursement for costs (R-21), but the contract provided for renegotiation of these fees "to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits" (R-128-c). The contract contemplated compliance by the Silas Mason Company with various federal and state regulatory statutes applicable to private employers, such as complying, in appropriate situations, with the Eight-Hour Law (R-38, 39, 40, 41, 43) and with the Walsh-Healey Act (R-47, 51, 116). Compliance with the Social Security Act was required because included among the reimbursable costs (R-54). The Silas Mason Company was required to adhere to local Workmen's Compensation Laws and to "procure all necessary permits and licenses, obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory or subdivision thereof wherein the work is done, or of any other duly constituted public authority" (R-75). The Silas Mason Company bought the raw materials in the open market, but under the contract (R-73) it was stipulated that title vested in the Government from the moment of acquisition by the Silas Mason Company.

The district judge granted the motion for summary judgment upon the theory that the munitions work-

ed on by the petitioners for transportation outside the State of Louisiana did not constitute interstate commerce, within the meaning of the Fair Labor Standards Act, because the goods were the property of the United States during their manufacture and interstate transportation (R-232, 239).

The Fifth Circuit Court of Appeals affirmed by an en banc court, Judge Hutcheson dissenting. Besides agreeing with the district judge that the petitioners were not engaged in the production of goods for commerce, the Fifth Circuit Court of Appeals additionally held that the Silas Mason Company was not an independent contractor, because the Government exercised a continuing supervision over the manufacture of the munitions (R-251).

Additionally, the Fifth Circuit Court of Appeals held that this contract between the Silas Mason Company and the Government, being under the authority of Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, entitled "An Act to Expedite the Strengthening of National Defense"), petitioners were therefore actually employees of the War Department.

It was also held, by the Fifth Circuit Court of Appeals, that the United States would be exempt in the situation presented here, under sub-paragraph "i" of Section 3 of the Fair Labor Standards Act, which exempts from operation of the Act "goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than the producer, manufacturer, or processor thereof".

Petitioners seek relief herein by certiorari.

## SPECIFICATIONS OF ERROR.

The decision below is erroneous in the following respects:

### I.

In holding that the respondent was not an independent contractor, but a mere agency of the United States.

### II.

In holding that petitioners were, in fact, employees of the War Department, in that they were governed, in their labors on these munitions, by the provisions of the Act of Congress of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A. 189(a) ); that consequently they are not entitled to the benefits of the Fair Labor Standards Act.

### III.

In holding that the munitions of war, in the production of which petitioners labored, were not "commerce" within the meaning of the Fair Labor Standards Act.

### IV.

In holding that the munitions of war, in the production of which petitioners labored, were not "goods" within the definition of Section 3(i) of the Fair Labor Standards Act, because of the exemptive proviso of that Act pertaining to the goods in the hands of the ultimate consumer, in this case the United States, who was not the producer, manufacturer, or processor thereof.



## SUMMARY OF THE ARGUMENT.

We epitomize the argument:

### I.

We urge that the cost plus a fixed fee contract here involved was substantially identical with that dealt with by this Court in the case of *ALABAMA v. KING & BOOZER*, 314 U. S. 1 and other cases, by the measure of which respondent was an independent contractor and petitioners, perforce, his employees; that petitioners' relation to respondent had all of the usual incidents of an employer-employee relationship; and that the mere fact that the War Department maintained close supervision of this operation and could require respondent to discharge an employee in order to insure the safety of the plant and its efficiency, were wholly insufficient to rob respondent of its independent status.

### II.

We urge that the provisions of the Act of July 2, 1940 (Public No. 703, 54 Stat. 712, 5 U.S.C.A. 189(a)) authorizing the Secretary of War to construct ordnance plants and other facilities through the medium of cost plus a fixed fee contracts, gave him the election to operate these plants either by government personnel or through the medium of qualified commercial agencies; that in this case he availed himself of the services of a qualified commercial agency, expert in manufacturing, and that this Act provides only for the hours, and rate of pay, for employees of the War Department — meaning that the con-

ditions of labor of petitioners would be prescribed by this Act, had the Secretary of War elected to operate the facility himself (which he did not); but the Act being wholly silent as to the working conditions which were to obtain in the event that the Secretary of War availed himself of the services of another, as here, it is clear that the provisions of the Fair Labor Standards Act were to prevail.

### III.

We urge that the munitions produced here, by the fact of transportation alone beyond state lines, meet precisely the definition of "commerce" set out in the Act; that the inclusion of the word "transportation" itself inescapably points this conclusion; that transportation, vel non, has always been regarded by this Court as commerce; and that many cases by this Court, beginning with *GIBBONS v. OGDEN*, 9 Wheat. 1, 6 L. Ed. 23, to and including *UNITED STATES v. SOUTHEASTERN UNDERWRITERS ASS'N.*, 322 U.S. 533, have held that commerce is not confined to the concept of trade and traffic; that outside the immediate area of conflict, war is not the antithesis of commerce, but often a stimulant; and that Congress, in excluding the Government from the Act, limited it to government in the ordinary sense; that the Government here is only collaterally affected, and that decisions of this Court, interpreting the letter, the spirit, and the purpose of the Fair Labor Standards Act, compel petitioners' inclusion.

## iv.

We urge that the exemptive provisions of Section 3(i) of the Fair Labor Standards Act, excluding goods after delivery into the actual physical possession of the ultimate consumer, do not apply here because of no clear showing that the United States was the consumer of all these munitions, in view of "Lend-Lease"; that, in any event, the United States did not have actual physical possession of these munitions, but merely constructive possession through respondent, an independent contractor, until after the productive processes had ended — that is, when the government ordered the munitions loaded onto railroad cars; that it has always been the view of the Administrator, concurred in by several of the Circuit Courts, that this exemptive provision of Section 3(i) was inserted in the Act for the sole purpose of insulating an innocent shipper of goods produced under sub-standard conditions against the penal provisions of Section 15 of the Act; that to take the theory of the court below on this point would permit, and invite, wholesale evasions of the Act and remove from the beneficent provisions of that Act large groups of workers.

## SPECIFICATION OF ERROR NO. 1.

### Respondent an Independent Contractor — Not a Mere Agent of the Government.

A prime reason for the decision below was the theory that the respondent was not an independent contractor but a mere agent or instrumentality of the Government, and hence, that petitioners were employees of the War Department. The cost plus a fixed fee contract which obtained in this case seems to be a standardized form used by the government for the securing of supplies during the late war. This Court has had occasion to consider the precise relationship of a contractor to the government, under such a contract, several times heretofore. *ALABAMA v. KING & BOOZER*, 314 U.S. 1, 87 L.Ed. 3; *CURRY v. U. S.*, 314 U.S. 14, 86 L. Ed. 9; *PENN DAIRIES v. PA. MILK CONTROL COMM.*, 318 U.S. 261, 86 L. Ed. 748.

The *KING & BOOZER* case involved an Alabama sales tax on materials purchased by the contractor to build facilities for the government. The government intervened and contended that since it was the recipient of the materials sold to the contractor, taking title at the facility site, as here, the sales in reality were to the United States and not subject to local sales taxes. This Court held that the soundness of this contention "turns on the terms of the contract and the rights and obligations of the parties under it". The Court held that the contractor was the purchaser, not the government, and said:



"The contract provided that the title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the government, 'upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the contracting officer'."

A similar provision is incorporated into this contract (R-21).

The Court further said:

"\* \* \* however extensively the government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power give the contractors the status of agents of the Government to enter into contracts or to pledge its credits. (*U.S. v. DRISCOLL*, 96 U.S. 421). The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump-sum contract. (*JAMES v. DRAVO CONST. CO.*, 302 U.S. 134)."

The case of *UNITED STATES v. COUNTY OF ALLEGHENY*, 322 U.S. 174, 88 L. Ed. 1209, does not derogate from the holding of this case. It merely declares that property of the United States, in the hands of a government contractor, is immune from local taxation. It did not hold that the contractor himself is immune.

Provisions of this contract are consistent only with the independent status of respondent. The contract declares (R-45, 113) that the 'employees "shall be subject to the control and constitute employees of the contractor"'.

It provided for renegotiation of excessive profits that might accrue to respondent (R-128). Profits are associated with the thought of an entrepreneur. The requirement of adherence to the Walsh-Healey Act (R-47, 50, 116) and to the Eight-Hour Law (R-38, 39, 41, 42 and 43), as well as the state Workmen's Compensation Laws (R-78) and the Social Security Act (R-54), is applicable only to the employees of a private entity.

The contract provided for fines, in certain contingencies, against the respondent, e.g., for failure to abide by the Eight-Hour Law (R-39) and the Walsh-Healey Act. If respondent is the government's agent, and not an independent contractor, we have the egregious situation of the government's imposing fines and penalties on itself. Such a stipulation, providing for fines or penalties in a similar situation, was characterized by this Court in *UNITED STATES v. DRISCOLL*, (26 U.S. 421, 24 L. Ed. 347), as "incongruous with the idea of his being an agent and not a contractor". Respondent was required to abide by all local laws enforceable in the state, territory or subdivision wherein the work was being done. We are aware that the federal government seeks to abide by local restrictions in the interest of harmony and comity; but to impose it as a binding and legal obligation in all contingencies, on its mere agent, goes beyond the requirement of mere comity.

The hiring of petitioners by respondent was without any hindrance on the part of the government, initially, and the wages to be paid petitioners were not prescribed by

the Government, except the minima exacted by the Walsh-Healey Act, — and that was a requirement grading wages upward. The contract further provided that the contractor "is the manufacturer of, or a regular dealer in, the materials, supplies, articles, or equipment, to be manufactured or used in the performance of the contract" (R-48(a)). This is inconsistent with any notion that respondent was a mere agent.

But the court below, ignoring this indicia of independence, found that because of the general supervision which the government exercised over the work, and particularly its right to *require* the discharge of any employee (R-76), respondent was a mere agent. This provision, with reference to the discharge of an employee, (R-76) is in this verbiage: "The contracting officer may require the contractor to discharge from work any employee the contracting officer deems incompetent or whose retention is deemed to be not in the public interest". But this right of discharge on the part of the government is indirect. An apt comment on this, in *27 AM. JUR., Sec. 11, p. 492*, is as follows:

"Sec. 11. \* \* \* Incidental powers retained by the employer over laborers, as the right to compel contractors to discharge workmen who are incompetent, although tending to show the contractors' subservience, do not necessarily require that the contractors must be considered mere servants. In fact, provision for the discharge may tend to show the independence of the contractor, as, for instance, where the contract provides that the contractor shall discharge incompetent workmen in his employment  
\* \* \*"

It is manifest that this requirement was inserted for security and efficiency reasons. This was a war project and success had to be assured, as well as complete protection against sabotage. Considered in the light of the additional fact that respondent had unlimited right, initially, to hire, and little restriction as to the wages, indicates that this situation is no different from that dealt with by this Court in *BUCKSTAFF v. McKINLEY*, 308 U.S. 358, 84 L. Ed. 322, where this Court said:

"The control reserved by the government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See *FEDERAL COMPRESS & WAREHOUSE CO. v. McLEAN*, *supra* (291 U.S. 17, 78 L. Ed. 622). That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See *JAMES v. DRAVO CONTRACTING CO.*, 302 U.S. 134, 82 L. Ed. 155. In effect, petitioner concedes the point by admitting its liability under the Social Security Act."

Another circumstance apparently relied on by the Fifth Circuit below was this provision, quoted in the footnote to that opinion, relative to supervisory power:

"Performance of the construction work of the entire project will be under the supervision of the contracting officers, appointed by the Quartermaster General."

THIS PROVISION RELATED TO THE CONSTRUCTION OF THIS PROJECT, NOT TO THE OPERATION OF THE PROJECT DURING WHICH TIME THESE PETITIONERS LABORED.



That in the operation of the plant the contract vested respondent with wide discretion as to the means of accomplishing the contract, and held it only for results, is apparent from the following:

"In carrying out the work under this Title IV (meaning operations) the Contractor is authorized and shall do all things necessary or convenient in the operating, and closing down, of the Plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the Contractor) \* \* \*". (R-45)

From the general provisions of the contract it can be gleaned, it is conceded, that a representative of the Government was in attendance, but this circumstance does not destroy the independence of the contractor as demonstrated in *BUCKSTAFF v. McKINLEY* (*supra*). Also see *CASEMENT & CO. v. BROWN*, 148 U.S. 617, 37 L. Ed. 582.

The third provision in the contract, relied on by the court below as supporting its position for the mere agency of the respondent, was this (R-16): "The government reserves the right to pay to the persons concerned all sums due from the contractor for labor, materials, and other charges". It is not claimed that this reservation was ever exercised. At no time did the Government pay these petitioners—they were always paid by respondent. Inasmuch as respondent did pay these petitioners, it is idle speculation as to what would occur had the government paid them. But even if the government had exercised its rights during the period in question, that is only one factor bear-

ing on the relationship, and is far from controlling. See *27 AM. JUR.*, verbo "*Independent Contractors*", Sec. 16, p. 497.

**Respondent Did Not Disclose Its Principal.**

It is quite clear, from the provisions of this contract, that these petitioners dealt exclusively with respondent, — it hired them, worked them, and paid them. It deducted their pro rata part of the Social Security tax, and it provided them with Workmen's Compensation. For aught that appears here, these petitioners did not know the United States, or the War Department, to be here at all. There is no showing that the petitioners knew that this contract had existence, much less knew the details of it. In such a situation, — if, indeed, the Silas Mason Company was a mere agency of the government — it stands in the position of **NOT HAVING DISCLOSED ITS PRINCIPAL, AND WOULD BE LIABLE TO THESE PETITIONERS BECAUSE THE CONTRACT WAS ITS OWN.** See *FORD v. WILLIAMS*, 21 Howard 227, 16 L. Ed. 36; *NASH v. TOWNE*, 5 Wall. 689, 13 L. Ed. 527; Sec. 322, *RESTATEMENT OF THE LAW OF AGENCY*, *AMER. LAW INSTITUTE*; *STOREY* on "Agency", Sec. 267. Also see note, 6 A.L.R. 649, for accumulation of cases. Hence, we urge that if this Court should find that the munitions produced here were "commerce" and "goods", then respondent would be liable to petitioners under the Fair Labor Standards Act, notwithstanding the fact that it was a mere agency of the United States; because, in its failure to disclose its principal, it made itself personally liable.

## SPECIFICATION OF ERROR NO. 2

### Petitioners Not Governed By The Act of July 2, 1940.

The court below, besides the reasons hereinabove discussed — that petitioners were not governed by the Fair Labor Standards Act — additionally held that petitioners were, in reality, employees of the War Department because the contract, on its face, indicated that it was made on the authority of the Act of Congress of July 2, 1940 (Public No. 703, 76th Congress, 54 Stat. 712, 5 U.S.C.A. 189(a) (E-24)).

This Act, in Section 1, authorized the Secretary of War, in his discretion, to acquire land for, and to build, among other things, ordnance plants for the manufacture of munitions, and to utilize, in his discretion, the services of cost plus a fixed fee contractors. Subsection (b) of Sec. 1 further provided, in part:

*"The Secretary of War is further authorized . . . to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorization contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, . . . under such terms and conditions as it may deem advisable . . ."*

(Emphasis ours)

Subsection 4(b) further provided:

*"Notwithstanding the provisions of any other law,*

the regular working hours of *laborers and mechanics employed by the War Department*, who are engaged in the manufacture or production of military equipment, munitions, or supplies, shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: Provided, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any work-week, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

(Emphasis ours)

The respondent itself has never, up to this time, contended that this Act had application in this situation. However, both the district judge (R-233) and the court below found it controlling. The writer does not find, in the numerous cases in the lower courts which have dealt with this matter, any reference to this theory.

By Section 1 of this Act the Secretary of War may, in his discretion, operate these plants either: (1) Through the agency of qualified commercial manufacturers (as in our case here), or (2) through government personnel.

We urge that subsection 4(b), above quoted, providing for compensation for laborers and mechanics employed by the War Department, was inserted to secure to laborers on the project tolerable working conditions, only in the event that the Secretary of War elected to operate this facility through *Government personnel*. There is no provision in the Act as to wage rates and hours of em-



ployees of commercial manufacturers (as here), who made contracts with the Government to operate such a plant. This omission can only signify the intent of Congress for the latter employees to have the benefits of the Fair Labor Standards Act.

Moreover, subsection 4(b) provides only for "laborers and mechanics". This expression, "laborers and mechanics", has persisted in federal statutes since prior to 1900 (see 40 U.S.C.A. 321, 324, 325, 326). It is fair to assume that the meaning of the expression in this Act of July 2, 1940, has the same meaning as has been ascribed to it in the previous Acts. *ELLIS v. UNITED STATES*, 206 U.S. 246, 51 L. Ed. 1049 (excluding masters, mates, engineers, firemen); 1912 Op. Atty. Gen. 583 (excluding seamen); *BREAKWATER v. UNITED STATES*, 183 F. 112 (excluding seamen); *GORDON v. UNITED STATES*, 31 Ct. Cl. 254 (excluding watchmen); *SWISHER v. UNITED STATES*, 57 Ct. Cl. 123 (excluding firemen).

There is nothing in the affidavit supporting summary judgment, or otherwise in this record, from which it can be determined that the petitioners here, who are described as safety inspectors and foremen, fall into the category of "laborers and mechanics". Hence, if this case should finally come to turn on this point, the matter would apparently have to be reversed for trial of this issue.

### **SPECIFICATION OF ERROR NO. 3.**

#### **Petitioners Produced for Commerce.**

The third reason assigned below why petitioners should be denied, was that these munitions were not "commerce". The Act defines "commerce", in Section 3(b);

"'Commerce' means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof."

The court reasoned that commerce was absent because: (1) the munitions were made for war, which is the negation or antithesis of commerce; (2) that it is not commerce, unless commercial; (3) that the government, in procuring these munitions, was performing an administrative act for the sovereign, which made them exempt. We will discuss these seriatim.

#### **War Not Negation of Commerce.**

Threaded throughout the opinion below, and boldly stated in the concurring opinion, is the concept that war is a negation of commerce, is wholly antipodal, and for that reason commerce could not exist in this situation. This idea has been expressed by other courts taking the same view. That idea is true only in part; in the area of hostilities, commerce does end, but outside of the immediate area of war, it is a stimulant of commerce. Such has been the history of this country. World War I generated general prosperity and produced many millionaires; World War II accelerated commerce in the United States to un-

precedented heights. There was a spurt of production, and a movement and interchange of commodities, beyond anything in our history, or the history of any other country, and almost beyond man's imagination. Commerce is necessary to war. Based upon its experience in the first World War, the Government in this war, by the device of renegotiation, provided for the scaling down of anticipated profits. It was provided for in this contract (*R-128*). Here in Louisiana, at this plant site, thousands of miles from the area of conflict, war brought an immense spurt in industrial output. It did not retard commerce — it quickened it!

**Commerce Need Not Be Commercial — Mere  
Transportation Suffices.**

This obsession with the notion that war was a negation of commerce, even at points distant from the conflict, was based upon the false notion that commerce is an exchange of commodities, in a commercial sense, between the peoples of various states.

This narrow concept of commerce as being merely trade or traffic has never obtained in this country. "Commerce", in the Constitution, is without a definition, but this Court has, from earliest times, construed it to include more than trade or traffic, beginning with *GIBBONS v. OGDEN*, (*supra*) to and including *UNITED STATES v. SOUTHEASTERN UNDERWRITERS' ASS'N*, 322 U.S. 533, 88 L. Ed. 1440. In the latter case, the Court observed (at p. 549): " \* \* not only then may transactions be commerce, \* \* \* though non-commercial \* \* \* ."

Recently this Court held, in *NATIONAL LABOR RELATIONS BOARD v. FAIBLATT*, 306 U.S. 600, 83 L. Ed. 1014, at p. 118:

"Transportation alone across a state line is commerce within constitutional control of the national government and subject to the regulatory power of Congress."

There are many other decisions of this Court, expressing the view that commerce need not be commercial, e. g., *GOOCH v. U.S.*, 297 U.S. 124, 56 S. Ct. 395, 80 L. Ed. 522 (kidnapped persons); *BROOKE v. U.S.*, 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A.L.R. 1407 (stolen automobiles); *WEBER v. FREED*, 239 U.S. 324, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317 (prize fight films); *HOKE v. U.S.*, 227 U.S. 308, 33 S. Ct. 231, 57 L. Ed. 523, 43 L.R.A., N.S., 906 Ann. Cas. 1913E, 905, and *CAMINETTI v. U.S.*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 443, L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168 (women for immoral purposes); *CHAMPION v. AMES* (lottery case) 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (lottery tickets); *REID v. COLORADO*, 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (diseased stock); *UNITED STATES v. SIMPSON*, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A.L.R. 510 and *UNITED STATES v. HILL*, 248 U.S. 420, 39 S. Ct. 143, 63 L. Ed. 337 (intoxicating liquors for personal use). Also see *EDWARDS v. CALIFORNIA*, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119.

Here, the Congress was not satisfied with employing the naked word "commerce" as was done in the Con-



stitution, although that might have sufficed in view of this Court's interpretation of the word. It was careful to define it as including "transportation". This specification is consistent with the notion that the courts intended to extend it to every employee engaged in production for transportation alone.

It is significant that the definition of commerce in the National Labor Relations Act is precisely the same as in the Fair Labor Standards Act (49 Stat. L. 449, Chap. 372, 29 U.S.C.A., Sec. 151, *et seq.*)

The National Labor Relations Board, in interpreting the National Labor Relations Act, has, with remarkable consistency, held to the view that interstate commerce includes interstate transportation of property of the United States, to be used for military purposes and for other purposes. *WESTINGHOUSE ELEC. & MFG. CO.*, 38 N.L.R.B. 404, 412; *UNITED STATES CARTRIDGE CO.*, 42 N.L.R.B. 191, 192; *BROWN SHIPBUILDING CO.*, 57 N.L.R.B. 326, 328; *ATLAS FENCE CO.*, 61 N.L.R.B. 984, 985; *ODENBACH SHIPBUILDING CORP.*, 64 N.L.R.B. 1026, 1034; *CARBIDE & CARBON CHEMICAL CORP.*, 73 N.L.R.B. 134, 135; *REYNOLDS CORP.*, 74 N.L.R.B. No. 248. Some of the lower federal courts have also taken the view that the transportation of goods for the convenience of the government was commerce. *BELL v. PORTER*, 159 F. 2d 117; *CLYDE v. BRODERICK*, 144 F. 2d 348; *WALLING v. HAILE GOLD MINES*, 136 F. 2d 102; *TIMBERLAKE v. DAY & ZIMMERMAN*, 49 F. Supp. 28; *ROLAND v. UNITED AIR LINES*, 75

*F. Supp. 25; JACKSON v. NORTHWEST AIR LINES, 75 F. Supp. 32; WALLING v. PATTON-TULLY CO., 134 F. 2d 945. See also UMTHUM v. DAY & ZIMMERMAN, INC., 235 Ia. 293, 10 N.W. 2d 238.*

In the definition of "employee" in the Act, Section 3(e), these words are used: "'employee' includes any individual employed by an employer". The word "any" is all-inclusive, and it certainly forecast the holding of this Court in *WALLING v. JACKSONVILLE PAPER CO., 317 U.S. 564, 87 L. Ed. 460*, where it was held that the Act was intended to extend to the utmost reach of interstate commerce specified in the Act. It specifies transportation.

Since the Act is remedial, those claiming exemption carry the heavy burden of persuasion and must show themselves excluded by both the letter and the spirit of the Act. *HELENA GLENDALE FERRY CO. v. WALLING, 132 F. 2d 616; FLEMING v. HAWKEYE PEARL BUTTON CO., 113 F. 2d 52*. Here, neither the letter nor the spirit admits the attempted exemption.

Unless the Fair Labor Standards Act be emasculated to nothing, it must be held to apply to contractors who, during the last war, and now, produce goods for the United States in the conventional way. This much was conceded by the court below in the use of this language: "If the defendant is engaged on this contract in the business of manufacturing munitions of war, either as a general proposition, or under a contract by which it agrees to produce and sell to the government either at a fixed price or at prices to be fixed from time to time, then we

are of the opinion that it would come within the Fair Labor Standards Act".

What difference can there be, essentially, in the working conditions of these petitioners here, making munitions for the United States government under a cost plus a fixed fee contract, as compared to those workers supplying goods for the United States in time of war or peace, such as the producers of trucks, oils, steel, and many other kinds of commodities?

Untoward consequences will result if this distinction between the ordinary contractors and cost plus a fixed fee contractors is adjudged, and between employees of the two kinds of contractors. What it means is, that workers for these two types of contractors, although they may be working toward the same end, under the same conditions, and making the same thing, for the army or the government, generally would be, quoad their employers, under different requirements as to the minima of wages and maxima of hours. There is no valid reason for this distinction. Judge Hutcheson, in his dissent below, aptly states what we seek here to portray:

"I ask upon what permissible theory can it be claimed that appellants are not covered here, when it is conceded that had they been working for a private plant which made munitions for sale and delivery to the United States for war, they would have been. The munitions in both cases would be for purpose of war and not for ordinary trade, but in both cases they would have been produced for transportation from a state to a place outside thereof."

We understand that the underlying reason for cost plus a fixed fee contracts rested in the fact of advancing costs of production and the hesitation of would-be contractors to make flat bids on government projects. To insure the contractor against this extra hazard of advancing costs, the policy of cost plus a fixed fee contracts was inaugurated. **THE GOVERNMENT OF THE UNITED STATES CERTAINLY DID NOT RESORT TO THIS DEVICE TO SAVE MONEY!** Judge Sibley characterized the cost plus a fixed fee method as "the business folly of making cost plus a fixed fee contracts".

Here was the government, quite willing to pay out extra money in order to get supplies. Could it be that the government was partisan in its generosity and was ready to make guarantees to the contractor, regardless of the consequence to the government, yet, at the same time, pursued toward the employees of the contractor a policy of stint? Why did not the government manifest the same niggardly attitude toward employees of its other class of contractors?

Permeating the opinion below, and the opinions of other lower courts arriving at a similar result, is a notion that these suits have a touch of the immoral and the unpatriotic — that they are an attempted gouge of the government. **BUT ALL THAT PETITIONERS SEEK HERE IS AN EQUALITY OF HOURS AND WAGES WITH OTHER EMPLOYEES OF CONTRACTORS FOR THE GOVERNMENT, DURING WARTIME, WHO, CONCEDEDLY, HAD THE BENEFIT OF THE ACTS.**



The government used oil, steel, machinery, vehicles, and a thousand other commodities. These commodities were used for WAR, and were as necessary as were munitions.

Surely the Court can look through mere form, method, labels, or apparatus, to the reality of this situation. Nomenclature is not controlling. That was demonstrated in this Court's recent holding in *RUTHERFORD FOOD CORPORATION v. McCOMB*, 329 U.S. \_\_\_\_\_, 67 S. Ct. 1473, decided June 10, 1947. Said the Court there:

“The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under sub-normal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interference arising from production of goods under conditions that were detrimental to the health and well-being of workers. \* \* \* Where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”

(Emphasis ours)

#### Congress Intended Coverage and Policy Requires It.

When this Act was passed in June, 1938, war, on a major scale, was in the offing. If not foreseen, at least the possibility of war was known to Congress, in view of our repeated experience with it. But, if war was not anticipated or taken into account, still Congress knew that the government had, from time immemorial, been making contracts with, and purchases from, private contractors,

*some of them cost plus a fixed fee* (see *UNITED STATES v. DRISCOLL, supra*). But the Act makes no exemption for employees of contractors for the government, of any kind whatsoever, whether conventional or cost plus a fixed fee. How then can the Court, as was done below, find a distinction between the two classes of contractors, where the Act makes none and history points to none?

When the war did come, with the expanded activities of the government, that did not cause Congress to amend this Act, although individual Congressmen thought it should be amended. We are informed, by the amicus curiae brief of the Department of Labor filed in the court below, that eighteen bills or resolutions were introduced in Congress, looking to the suspension of the Act during the war (Senate Bills Nos. 2232, 2373 and 2884, and House Resolutions Nos. 6617, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054 and 7731, of the 77th Congress, 2d Session; Senate Bills Nos. 190 and 237, and House Resolution No. 992 of the 78th Congress, 1st Session) none of which were passed. Obviously, such amendments were unnecessary, unless applied to the large group of people who were working for cost plus a fixed fee contractors.

Additionally, it is clear that Congress continued to have this view — the coverage of the Act — because in the Portal to Portal Act of 1947 (Public Law 49, 80th Congress, Chap. 52) there is set forth, in Section 1, the Congressional finding that the cost to the government, under the Fair Labor Standards Act, required the Congress to act; and the Judiciary Committee, in its report on this bill, referred

to the fact that expenditures by the government for supplies, through the medium of cost plus a fixed fee contractors, amounted during the war to \$40,000,000,000. Accordingly, Congress, both during and after the war, adhered to the view that the Act applied to cost plus a fixed fee contractors. Moreover, the Executive Department had the same view. Executive Order No. 9301, appearing in the appendix, established the 48-hour minimum workweek, but it was careful to provide that it should not be "construed as suspending or modifying any provision of the Fair Labor Standards Act". We quote Paragraphs 2 and 5 of this Order:

"(2) All departments and agencies of the Federal Government shall require their contractors to comply with the minimum workweek prescribed in this Order and with policies, directives, and regulations prescribed hereunder, and shall promptly take such action as may be necessary for that purpose.

"(5) Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U.S.C. 201, et seq.) or any other Federal, State or local law relating to the payment of wages or overtime."

Particular reference is made to the expression: "All departments and agencies of the federal government shall require *their contractors* \* \* \*", and the expression: " \* \* nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act". Note that there is no exemption of the cost plus a fixed fee contractor. It says: " \* \* *their contractors*", which would certainly include all kinds of contractors with the government. The Congress could not have been unaware of this Executive Order, and if it did not express the intent of the Fair Labor Standards Act, doubtless the Congress would have acted. Besides, it is common knowledge that the President, then Mr. Roosevelt, and the Congress during his regime, were thoroughly committed to the retention, during the war, of what has come to be called "labor's gains", embodied, in part, in the Fair Labor Standards Act.

**That Procurement of Munitions Was  
Administrative Not Significant.**

Inferentially below, and expressly in other decisions, commerce is said not to be involved in this situation because the procurement of these munitions was an administrative activity of the sovereign. Under Section 203(d) of the Act, it is provided:

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when



acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

It is only under subsection (d) immediately above quoted that the United States Government is expressly or impliedly referred to.

The Government is not the employer here. In the contract is a disclaimer by the government that it is the employer. There is nothing in the statute itself elsewhere, to indicate that Congress intended that the words of the statute excluding the Government should be taken in other than the ordinary meaning. We submit that, according to ordinary understanding, the Government does not stand here as the employer, rather than the respondent.

An act of the Government is none the less administrative if in time of peace, instead of war. If the Act is deemed inapplicable because the procurement of these munitions was an administrative act, it would exclude great segments of the working population because *all* workers under government contracts would be excluded. In other, but analogous, situations, exclusion on this argument has been denied. Take the case of the United States mails — as relates to the National Labor Relations Act, employees for contract mail carriers have been held as in commerce. *N.L.R.B. v. CARROLL*, 120 F. 2d 457. As relates to the Fair Labor Standards Act, employees of contract mail carriers have been adjudged under the Act. *THOMPSON v. DAUGHERTY*, 40 F. Supp. 279; *FLEMING v. GREGORY*, 36 F. Supp. 776; *MAGANN v.*

*TRANSPORTATION CO.*, 39 F. Supp. 742. In the case of *WALLING v. PATTON-TULLEY TRANSPORTATION CO.*, 134 F. 2d 945, employees of an independent contractor on dyke and revetment work on the Missouri and Mississippi Rivers were subject to the Fair Labor Standards Act. Insofar as levees and their repairs are concerned, that is certainly administrative activity. In fact, to a limited extent the federal government owns these rivers, but not, of course, as fully as it owned the munitions in this case. But counsel, in the court below, urged that general legislation does not include the sovereign, unless by express words or compelling implication, citing *UNITED STATES v. HOAR*, 2 Mason 311, *UNITED STATES v. GREEN*, 4 Mason 427; *UNITED STATES v. HUGHES*, 26 Fed. Cases 297; and *DOLLAR SAVINGS BANK v. UNITED STATES*, 86 U.S. 227. Overlooked, however, is the fact that the existence of the government of the United States was manifestly considered by the lawmakers and fully provided for to the extent intended by the sole mention of the government in sub-section (d) of Section 203 of the Act quoted above.

Moreover, the rule of the *HOAR*, *HUGHES*, and *DOLLAR SAVINGS BANK* cases, *supra*, applies only in the situation where the Government is in litigation. In all these cases, the Government was a party. Here the Government is not a party, and is affected only because, by contract, the results of this law-suit may touch the Government. But the fact that the Government may be affected has, by this Court, been held not to insulate the cost plus

a fixed fee contractor from the burdens of his contract. *ALABAMA v. KING & BOOZER, CURRY v. UNITED STATES*, supra. In those cases, the Court was solicitous to preserve local rules, regulations and laws. Surely Congress did not intend for a national policy, embodied in the Fair Labor Standards Act, to be frustrated in a situation where care is taken to permit the operation of local policies. This precise argument was presented and rejected in an identical situation in the Supreme Court of Iowa, in the case of *UMTHUM v. DAY & ZIMMERMAN*, (supra). We excerpt from that case:

"The statement of Justice Story in the *HOAR* case is by no means a hard and fast rule by which the sovereign is excluded from general terms of a statute; the purpose, subject matter, context, legislative history and executive interpretation are aids to construction which may indicate an intent to bring the sovereign within the scope of the law. *UNITED STATES v. COOPER CORPORATION*, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071, 1074, 1075, Roberts, J. 'Cases in which the doctrine of the *HOAR* case have been applied are of two classes: (1) Those where the act, if the sovereign were not excluded, would deprive it of a recognized or established prerogative title or interest. A classic example of these cases is *UNITED STATES v. HOAR* itself, holding the sovereign is exempt from general statutes of limitations. (2) Those where the act would work obvious absurdity if the public or its officers were not held to be impliedly excluded, as, for example, the application of a speed statute to a policeman pursuing a criminal or to a fire department responding to a fire alarm. *NARDONE*

*v. UNITED STATES*, 302 U.S. 379, 58 S.Ct. 275, 82 L. Ed. 314, 317, *Roberts, J.* Plainly, this case does not fall within either of these classes. The government is not a party to the case. It is not resisting plaintiff's action but on the contrary the Department of Labor has filed an *amicus curiae* brief urging a reversal. Plaintiff was not an employee of the government but of a private corporation.

"There is another recognized exception to the rule, if it can be called such, of *UNITED STATES v. HOAR*. Where a statute is for the public good or to prevent injury and wrong, the sovereign is bound by it although not particularly named therein. *NARDONE v. UNITED STATES*, *supra*, 302 U.S. 379, 58 S.Ct. 275, 82 L. Ed. 314, 318; *UNITED STATES v. HERRON*, 20 Wall. 251, 22 L. Ed. 275, 276. It would seem that the Act involved here was intended for the public good and to prevent injury and wrong."



**SPECIFICATION OF ERROR NO. 4****Munitions Not Exempt as Goods in the Hands  
of the Ultimate Consumer.**

Finally, it was held by the court below that the munitions manufactured here were excluded under the Act, by the provisions of sub-paragraph (i) of Section 3, which reads:

“‘Goods’ means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.”

It is said that the productive processes here, during which petitioners labored, did not occur until after these goods (or at least the raw materials from which the munitions were made) were delivered into the hands of the government of the United States, which was the ultimate consumer of the munitions; that the exemptive provision of the above quoted paragraph thus came into operation.

This view is untenable — firstly, because the exemption does not become effective until after delivery into the *actual physical possession* of the ultimate consumer. Here, the actual physical possession on the part of the Government did not come about, under any theory, until the goods were processed to completion and were loaded on railroad cars, and, it may be, not until the goods were de-

livered to the armed forces on the battle front. At any rate, the Silas Mason Company procured these goods in its own name, held these goods under a bailment, and processed them for the Government. Thus, the respondent had actual physical possession of these munitions, and the raw material out of which they were processed, during the critical interval — the interval of production. The Government had only the constructive possession. Constructive possession is no more than the legal presumption of possession which follows title, where the actual physical possession, as here, is in another, or in no one. *BROWN v. VOLKENING*, 64 N.Y. 76, 80; *ASHLEY CO. v. BRADFORD*, 109 La. 642, 33 So. 634; *HARRIS v. PAUL*, 174 N.E. 615; *C.I.T. CORP'N v. BILTMORE GARAGE*, 36 *pac.* (2d) 247; *LITTLETON v. ROBERTS*, 187 S.E. 349.

This Court had an analogous situation before it in *NATIONAL SAFETY DEPOSIT CO. v. STEAD*, 232 U. S. 58, 58 L. Ed. 504. Confronting the court there was the question of inter-relation between the bank, renting deposit boxes, and the renter — the question as to who had possession, and the kind of possession, as between the renter of the box and the bank. Justice Lamar of this court said:

"Certainly the person who rented the box was not in actual possession of its contents, for the valuables were in a safe built into the company's vault and therefore, in a sense, under the protection of the house. The owner could not obtain access to the box without being admitted to the vault, nor could he open the box without the use of the company's master key."

A well established and ancient classification of possession has been into (1) constructive, and (2) actual physical possession. We have to assume that Congress acted knowingly and deliberately in selecting one class of possession over another. Had the government said the constructive possession of the ultimate consumer, or even the mere possession of the ultimate consumer, then this provision would operate; but having employed language which requires immediate corporeal contact, the words of the statute expressly exclude exemption.

This exemption is apparently designed to immunize the ultimate consumer himself, and him only. The respondent here was not the ultimate consumer, and surely it cannot claim an exemption designed for another.

The best statement on this facet of the problem, that we have found, is that of Judge Russell in *FLEMING v. ATLANTIC CO.*, 50 F. Supp. 654:

"Production of goods presupposes acts and employment prior to any delivery and there can be no reasonable construction of the statute which would relate the condition of goods after delivery to production. Goods cannot be produced after they are in the actual physical possession of the ultimate consumer. Statement of this term of the statute, with the exclusion appended, discloses the unreasonableness of such construction. Thus, 'every employer shall pay to each of his employees engaged in the production of goods, but not including goods after their delivery into the actual physical possession of the ultimate consumer thereof' makes no sense at all, if, as above stated, the production aimed at by the Act must precede the delivery."

For other cases discussing it, see *JACKSON v. NORTH-WEST AIR LINES*, *supra*; *MOEHL v. E. I. DU PONT DE NEMOURS & CO.*, 12 Labor Cases, Par. 63, 545.

It has long been the Administrator's view (see Paragraph 6 of Interpretive Bulletin No. 5, Revision of 1939, issued by the Administrator) that the purpose of Section 8(i) was intended to make effective the penal sections of Section 15 of the Act, so as to immunize the innocent shipper of goods produced contrary to the Act. This interpretation, while not controlling, is entitled to respectful consideration. *OVERNIGHT MOTOR TRANSPORTATION CO. v. MISSEL*, 316 U.S. 572, 86 L. Ed. 1632. To apply this exemption, as sought by respondent, would permit the exemption of production intended for commerce, contrary to the broad scope of the Act. What was happening here must not be lost sight of. Respondent acquired these raw materials from outside the State of Louisiana — metals and other products not obtainable in Louisiana — processed them immediately, and, on orders of the Government, shipped them out. It involved interstate commerce in two directions, — the inflow and the outflow — and it was, under any reasonable theory, a continuous process. The processing was simply a step in interstate commerce. In *BELL v. PORTER*, *supra*, the Seventh Circuit denied this exemption in these words: " \* since the stoppage of the goods for the purpose of manufacturing and processing did not stop the flow of commerce". This Court itself long ago reached the same view in *STAFFORD v. WALLACE*,



253 U.S. 495, 66 L. Ed. 735. See also *SWIFT & CO. v. U.S.*, 196 U.S. 375, *U.S. v. DARBY LUMBER CO.*, 312 U.S. 100.

Unless the character of the sovereign insulates against liability in this situation, differentiating it from private entities, untoward and unexpected results will ensue. Take the case of a railroad owning coal mines. If the railroad should mine this coal itself, for consumption on its engines, it would then not have the benefit of the provision, because it excludes the ultimate consumer who is a "producer, manufacturer or processor"; but if the railroad utilized the medium of an independent contractor, the contractor would be exempt, says the respondent. Illustrations could be endlessly given. Take an automobile company which owned its own steel mills, such as Kaiser-Fraser and its Fontana plant, or the Pullman Company, making its own cars. This would offer an opportunity for wholesale evasion of the Act, so as to take large groups of productive workers, otherwise under the Act, out from its benefits, in what appears to be a wholly unexpected result.

Finally, it is not so clear on this record (summary judgment) as to preclude further inquiry, that the United States was the ultimate consumer of these munitions. It is true that Mr. Telford, who was General Manager for respondent, did state in the affidavit supporting judgment that the munitions were "shipped out of the said premises

for use by the armed forces in its war effort in the war with Germany, Japan, Italy and other nations" (R-21), still, it is apparent that Mr. Telford, who was not in the Government's employ, could have had no personal knowledge as to the actual use of these munitions. The munitions were used thousands of miles away from where Mr. Telford operated. It would be no part of his business to know, and we know that Mr. Telford, a private citizen, would not be given this information by the Government, for security reasons. There was no reason why he should know, and every reason why this kind of information would have been withheld from him.

It is true that we filed no affidavit controverting this, or any other, assertion in Mr. Telford's affidavit; but no one understood that this expression in his affidavit, adverted to just above, was to be taken to mean an assertion that the United States Government consumed all these munitions. Indeed, the expression "used by its armed forces" could well mean, and comprehend, use by the Allies. Allies we did have, thanks to a beneficent Providence, among whom were England, Russia and China, all of whom, as a matter of common knowledge, were known to have used great quantities of munitions produced in the United States. To so conclude is to ignore "Lend-Lease" (U.S.C. A. 20, Sections 411-423), and the billions of dollars spent for "Lend-Lease" purposes. Therefore, if this case comes to turn on this point, we respectfully suggest that it should be remanded for the taking of testimony on this point. The

burden of clearly and unequivocally supporting a claimed exemption rests upon him who asserts it — in this case, resting on respondent. It has not been discharged.

We therefore respectfully submit that this case should be reversed and remanded for trial.

Respectfully submitted,

**LEONARD LLOYD LOCKARD**  
Attorney for Petitioners

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I hereby certify that I have this \_\_\_\_\_ day of March, 1948 given copy of the above and foregoing brief to Charles D. Egan, Esquire, Counsel for respondent herein, by manually placing same in his hands.

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**L. L. Lockard**

## APPENDIX "A"

**48-HOUR MINIMUM WARTIME WORKWEEK  
EXECUTIVE ORDER 9301**

(22,855)

(Signed by the President, February 9, 1943.)

By virtue of the authority vested in me by the Constitution and statutes, as President of the United States, and in order to meet the manpower requirements of our armed forces and our expanding war production program by a fuller utilization of our available manpower, it is hereby ordered:

1. For the duration of the war, no plant, factory or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum workweek therein is less than 48 hours per week.
2. All departments and agencies of the Federal Government shall require their contractors to comply with the minimum workweek prescribed in this Order and with policies, directives, and regulations prescribed hereunder, and shall promptly take such action as may be necessary for that purpose.
3. The Chairman of the War Manpower Commission shall determine all questions of interpretation and application arising under this Order and shall formulate and issue such policies, directives, and regulations as he determines to be necessary to carry out this Order and to effectuate its purposes. The Chairman of the War



Manpower Commission is authorized to establish a minimum workweek greater or less than that established in Section 1 of this Order or take other action with respect to any case or type of case in which he determines that such different minimum workweek or other action would more effectively contribute to the war effort and promote the purposes of this Order.

4. All departments and agencies of the Federal Government shall comply with such policies, directives, and regulations as the Chairman of the War Manpower Commission shall prescribe pursuant to this Order, and shall so utilize their facilities, services, and personnel, and take such action under authority vested in them by law, as the Chairman determines to be necessary to effectuate the purposes of this Order and promote compliance with its provisions.
5. Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201, et seq.) or any other Federal, State or local law relating to the payment of wages or overtime.

## APPENDIX "B"

## \* Title 29, U.S.C.A., Section 206:

"as 206. Minimum wages; effective date

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:-

- (1) during the " . . . . .
- (2) during the next six years from such date, not less than 30 cents an hour,
- (3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of this Administrator issued under section 208 of this title, whichever is lower, and
- (4) at any time after " . . . . .
- (5) if such employee is " . . . . . , etc."

## APPENDIX "C"

## Title 22, U.S.C.A., Section 207:

## "207. Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ and of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek \* \* \* \*

(2) for a workweek \* \* \* \*

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer \* \* \* \* etc."

## APPENDIX "D"

## Title 29, U.S.C.A., Section 215:

"§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate . . . . etc."



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CLERK**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

**No. 590**

**HARRIS KENNEDY, ET AL,**

**Petitioners**

**versus**

**SILAS MASON COMPANY,**

**Respondent**

**On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Fifth Circuit**

**BRIEF OF RESPONDENT**

**CHARLES D. EGAN,**

**Attorney for Respondent**

**LECOMTE, SHREVEPORT, LOUISIANA**



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Constitution of the United States:	
Article 1, Section 8, Clause 3	19
Article 1, Section 8, Clauses 11 and 12	20

## OTHER AUTHORITIES

Executive Order 9301	23
President's Message in May of 1937, 81 Cong. Rec. 4960	27
27 Am. Juris. 486	33
Supreme Court Rule 27, Subsection 6	36

# **SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

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**No. 590**

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**HARRIS KENNEDY, ET AL,**

**Petitioners.**

**VERSUS**

**SILAS MASON COMPANY,**

**Respondent**

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**On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Fifth Circuit**

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**BRIEF OF RESPONDENT**

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**INTRODUCTION**

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The decision below (R.251) is reported at 154 Fed.  
(2d) 1016.

The case comes here on writ of certiorari directed  
to the United States Circuit Court of Appeals for the  
Fifth Circuit.



The question involved is whether or not the *Fair Labor Standards Act* (c.676, 52 Stat. 1060, 29 U. S. C., 201-219) applies to petitioners, employees of respondent, operator of an Ordnance Plant under a cost-plus-a-fixed-fee contract with the United States during the late War.

### STATUTE INVOLVED

The provisions of the Fair Labor Standards Act relevant to the issues of this case are as follows:

29 U. S. C., 202 - Congressional-finding and declaration of policy

"(a) The Congress finds that the existence, in industries engaged in Commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of sections 201-219 of this title, through the exercise

by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

**29 U. S. C. 203 — Definitions**

As used in sections 201-219 of this title—

- “(b) ‘Commerce’ means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
- “(d) ‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State, or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organizations.
- “(e) ‘Employee’ includes any individual employed by an employer.
- “(g) ‘Employ’ includes to suffer or permit to work.
- “(h) ‘Industry’ means a trade, business, industry, or branch thereof, or group of in-

dustries, in which individuals are gainfully employed.

(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof.

(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods; or in any process or occupation necessary to the production thereof in any State.

29 U. S. C., 206—Minimum wages; effective dates

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates -

(2) during the next six years from such date,  
not less than 80 cents an hour,

- (3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 80 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower.

**29 U. S. C., 207 — Maximum hours**

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

- (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**29 U. S. C., 215 — Prohibited acts; prima facie evidence**

- "(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; \* \* \*



**29 U. S. C., 216 — Penalties; civil and criminal liability**

- "(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.**
- (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. \* \* \*"**

**SUMMARY STATEMENT OF THE CASE**

**The summary statement contained in petitioners' brief is accepted with the corrections, modifications and additions below.**

**The record contains no reference to the shipment of munitions to the Nation's Allies.**

The statement that respondent shipped the munitions out of the Plant is a conclusion. They were shipped through Government orders as Government property (R. 21), and respondent's only function was the preparation of the munitions for shipment and the loading of the same on carriers. (R. 45).

The statement that respondent purchased the raw materials in the open market does not correctly reflect the facts. The Government supplied all explosives and metal parts for the loading of the munitions, as well as shipping materials and containers. (R. 45, 88). Respondent was at liberty to provide other materials (R. 45, 113), but when it did, the Government took title at the point of purchase. (R. 89, 181). The result was that all material involved was shipped to and arrived at the Plant as Government property. (R. 21).

### SUMMARY OF ARGUMENT

The controlling facts are contained in the affidavit of R. L. Telford in support of the motion for summary judgment (R. 20, 21) and in the provisions of the contract under consideration. (R. 22-218).

The contract (R. 22-218) provided for the construction and operation under Government direction by respondent.

ent of a plant located upon a Government reservation and devoted to the loading of munitions. Component parts of the loaded products and all equipment used or consumed in the process were Government supplied. The amount and type of munitions loaded, the number of respondent's employees, their hours of work and rates of pay were matters for Government determination. The finished product, as Government property, was transported to the fighting forces as the Army directed. Respondent was reimbursed for all expenditures, guaranteed against financial loss as a result of its commitments and paid a fixed fee for its services. Relevant provisions of the contract include the following:

- (1) The Plant is to be used for the loading of munitions. (R. 25, 26, 111, 148, 172).
- (2) Respondent is obligated to operate the Plant as directed by the Government's representative, the Contracting Officer. (R. 44).
- (3) In consideration of its undertaking respondent shall be reimbursed for its expenditures and receive a fixed fee for its services. (R. 47).
- (4) When directed by the Contracting Officer, respondent is obligated to reduce its overhead and/or personnel, or increase the workdays per week, or hours of labor per day. (R. 34).
- (5) The Government is to furnish all component

parts for the loading of munitions. (R. 45, 88).

- (6) No person shall be employed by respondent in certain named supervisory capacities without the approval of the Contracting Officer. (R. 58).
- (7) Funds necessary for the operation of the Plant are to be furnished respondent by the Government in the form of an interest free revolving fund. (R. 64, et seq.).
- (8) The operation of the Plant shall be at the expense of the Government, and the Government shall hold respondent harmless against any loss, expense, or damage of any kind arising out of, or in connection with, such operation. (R. 70, 71). Although this hold-harmless provision would cover judgments obtained in cases such as the instant case, there is a subsequent stipulation specifically providing for reimbursement of such judgments. (R. 181).
- (9) Title to all work completed, or in the course of construction, preparation or manufacture shall be in the Government. (R. 73). Subsequent modifications of the Title provision (R. 89, 181) to provide that the Government might take title to equipment at points of origin did not alter the basic fact that title to all property involved was in the Government.
- (10) Title to all material, tools, machinery, equipment or supplies, for which respondent is entitled to reimbursement, shall vest in the Government at such point as the Contracting Of-



ficer shall designate in writing. (R. 89, 181). This refers to material not furnished direct by the Government but purchased by respondent under the provisions of the contract appearing at Pages 45 and 118 of the Record.

- (11) Respondent is obligated to keep at the site of the work a representative to receive and execute the directions of the Contracting Officer. (R. 76).
- (12) The Contracting Officer may require respondent to dismiss any employee deemed by the Contracting Officer to be incompetent or whose retention is considered not to be in the public interest. (R. 76). A dismissal under this provision may be the subject of an appeal under the dispute clause referred to in (13) below.
- (13) Disputes arising under the contract are decided by a Board appointed by the Secretary of War to which appeals are taken in the manner prescribed by the Board. (R. 79, 133).
- (14) Respondent's notes and other data concerning design, construction and equipment of the Plant become Government property. (R. 35).
- (15) The Government reserves the right to pay directly to the persons concerned all sums due by respondent for labor, materials and other charges. (R. 60, 89).
- (16) No purchase in excess of \$500 may be made and no subcontract entered into by respondent

without the approval of the Contracting Officer. (R. 75, 76).

- (17) Respondent is reimbursed for all costs of reworking rejected materials and materials finally rejected. (R. 54).
- (18) The contract is subject to termination in whole or in part at the will of the Government. (R. 68, 120).

The factual situation resulting from the operation of the contract is set forth in the Telford affidavit, reading in relevant part:

"That Silas Mason Company constructed and later operated the Louisiana Ordnance Plant under the terms of a contract with the United States of America, a copy of which is filed in the proceeding hereinafter mentioned. (this proceeding).

That at all times involved in the complaint of complainants in the proceeding just above mentioned, the premises upon which complainants were employed, the tools and equipment which they were using in their employment, and the property and products with which they dealt in such employment, were all the property of, and belonged to, the United States Government; that the component parts of the shells, grenades, mines, fuses, bombs, and other products with which all of the complainants dealt were shipped to the Louisiana Ordnance Plant as property of the Government and the finished product, as property of the Government, was, by its direction, shipped out of the said premises for use by its Armed Forces in its War effort in the War with Germany, Japan, Italy, and other Nations." (R. 20, 21).

Factual findings of the Court below (embodied in a statement containing certain legal conclusions) were:

"The United States was engaged in a war which challenged the very life of the Nation. The defendant was called in and entered into a contract with the Government to construct for it an ordnance plant at Shreveport, Louisiana; and when such plant was erected, to manufacture munitions of war for the Government. The Government owned the land upon which the ordnance plant was built; it owned the plant; it owned the equipment and the materials which went into the manufacture of the munitions; and when such munitions were finished and ready for use, they were stored in plants and buildings which belonged to the Government, or went immediately to the firing line to be there used by the troops. These munitions never at any time went into or became a part of commerce as defined by the Fair Labor Standards Act. They were not manufactured for sale, nor were they ever intended or used for commercial purposes. The Mason Company had no interest, financial or otherwise, in the shipment, destination, or delivery of these munitions. It sold nothing in interstate commerce; it delivered nothing in interstate commerce; and it shipped nothing in interstate commerce except as an agent or instrumentality for the loading of munitions which already belonged to the United States."

In the light of the contract provisions and the undisputed facts set forth in the Telford affidavit and summarized in the above quotation from the opinion below, respondent contends:

- (1) Interstate transportation by the Government of Government owned munitions for use by its Armed Forces is not "commerce" within the meaning of the Fair Labor Standards Act.
- (2) The Act is inapplicable to the litigants as the enterprise in which they were engaged was that of the Government, their activities related to War, not commerce, and respondent was an agent or instrumentality of the Government in the employment of petitioners and the operation of the Plant.
- (3) The munitions involved were not "goods" within the definition of Section 3 (i) of the Act because of the exclusionary provision relating to goods in the hands of the ultimate consumer.

### ARGUMENT

Three fundamental fallacies permeate the argument contained in petitioners' brief.

The first is the assumption that respondent carries the burden of proving an exemption from the Act. This would only be true if respondent admitted that the Act was applicable to its activities and asserted that petitioners were exempt under Section 13. The burden of proof here is on petitioners. (*Warren-Brodshaw Company v. Hall*, 317 U. S. 88, 87 L. Ed. 83).

The second is the assumption that an affirmance of the Circuit Court decision would exclude all employees of contractors with the Government from the benefits of



the Government's general labor policy. Overlooked here is the fact that the Fair Labor Standards Act applies to many employees of contractors with the Government. Overlooked also are such Acts as *Walsh-Healey* (49 Stat. 2036-2039, 41 U. S. C., 35-45) and *Bacon-Davis* (37 Stat. 726, 40 U. S. C., 321-325) which under ordinary circumstances cover practically the entire field of Government contracts.

The third is the assertion that the Court should retroactively read the mind of the Congress which met in 1938 and decide whether that Congress, had it anticipated the late War and the terms of the contract under consideration, would have included petitioners within the coverage of the Act.

There is no inherent right to the benefits of the Act and its provisions can be invoked only by those to whom its coverage extends. The benefits of the Act are in the nature of special privileges conferred by the Congress upon those persons, and those persons only, to whom the Act is applicable. The Court is not concerned with the wisdom or even the fairness of either the inclusion or exclusion of any particular litigant or group of litigants. The litigants and the Court must take the Act as they find it. The contention that petitioners should receive the benefits of the Act because it applies to others engaged in somewhat related activities addresses itself to the Congress and not to the Court.

Prefacing our argument with the request that the Court bear in mind throughout its consideration of this

case the plain Congressional intent to exclude the Government from the terms of the Act (Sec. 3 (d) ), we now turn to a discussion of our three above listed contentions, each of which was sustained below, and any one of which if sustained here will result in an affirmance.

**INTERSTATE TRANSPORTATION BY THE GOVERNMENT OF GOVERNMENT OWNED MUNITIONS FOR USE BY ITS ARMED FORCES IS NOT "COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.**

**(a) The Transportation Involved Was an Administrative Act of The Sovereign.**

Petitioners have never contended that they were engaged in "commerce", but have based their case upon the assertion that they were engaged in the "production of goods for commerce". The "goods" produced were munitions loaded at the Louisiana Ordnance Plant. The claim that these "goods" were "produced for commerce" rests upon the fact that the Government in its fight for survival transported its munitions across State lines.

The Act is made inapplicable to the United States by the exclusion contained in the definition of "employer" in Section 3 (d). We emphasize the fact that petitioners can invoke the Act only if it applies to interstate transportation of Government owned munitions in time of War and point out that such shipments are not commercial transactions, but, administrative acts of the Government.

In the absence of a decision by this Court we call attention to the fact that shipments of the type under con-

sideration are regarded as administrative acts of the Government by the weight of Circuit Court opinion.

In addition, to the holding of the Fifth Circuit in the instant case and in *St. Johns River Shipbuilding Company v. Adams*, 164 Fed. (2d) 1012, there are decisions by the Second, Fourth, Seventh, Ninth and Tenth Circuit Courts.

The Ninth Circuit held in *NLRB vs. Idaho-Maryland Mines Corporation*, 98 Fed. (2d) 129, and reiterated in *Fox vs. Summit King Mines*, 143 Fed. (2d) 926, that interstate shipments of Government owned gold and silver were administrative acts of the Government and not such commercial transactions as to fall within the purview of the National Labor Relations Act.

The Second Circuit in *Divins vs. Hazeltine Electronics Corporation*, 163 Fed. (2d) 100, held that battleships, aircraft carriers and submarines were instrumentalities of war and not of commerce, and that the Fair Labor Standards Act does not apply to persons repairing or servicing the equipment of such ships, in spite of the fact that the operation of the ships by the United States literally complied with the statutory definition of commerce in the Act.

The Fourth Circuit in *Walling vs. Haile Gold Mines*, 136 Fed. (2d) 102, reversed a District Court decision holding the Fair Labor Standards Act inapplicable to a shipment of gold. The reversal was not based upon a conflicting view of the legal principles involved, but upon a factual

finding by the Circuit Court that title to the gold transported did not vest in the Government until the conclusion of the interstate shipment. The decision applying the Act to defendant was based squarely upon a holding that gold was transported by the defendant and not by the Government, and it is apparent that if title had vested in the Government prior to the interstate shipment the Court would have held the Act inapplicable.

The Tenth Circuit in *Clyde vs. Broderick*, 144 Fed. (2d) 348, reversed a District Court decision that the Fair Labor Standards Act was inapplicable to a shipment of property to a Government owned plant. The reversal, however, was based on a factual finding that the goods shipped were owned by a private contractor and not by the Government. The Circuit Court did not question the conclusion of the Court below that the Act does not apply when Government owned property is shipped interstate.

The Seventh Circuit in *Bell vs. Porter*, 159 Fed. (2d) 117, expressed the opinion that interstate transportation of Government owned munitions constituted "commerce" within the meaning of the Fair Labor Standards Act. The expression of opinion was dicta in view of the rejection of the claimant's demands on other grounds; *Clyde vs. Broderick*, *supra*, is cited as a result of an apparent misunderstanding of the holding, and it does not appear that the gold cases above mentioned were called to the Court's attention.

Summarizing, we find that the contention that in-



terstate shipment of Government owned munitions is not a commercial transaction, but an administrative act of the Government, finds direct support in decisions of the Second, Fifth and Ninth Circuits, inferential support in decisions of the Fourth and Tenth Circuits, and is questioned only by the dictum contained in a decision of the Seventh Circuit.

The contention under consideration also finds support in the decision of this Court in *United States vs. United Mine Workers of America*, ——— U. S. ———, 91 L. Ed. 595, to the effect that Government operation of coal mines is the exercise of a Sovereign function. Obviously the fundamental concept of Sovereignty is more apparent in the production and transportation of munitions in time of war than in the operation of coal mines in time of peace.

(b) The Policy Of The Act Has No Application To Such Transportation.

- (1) Neither the power exercised nor the declared policy of the Act is relevant to such transportation.

In *United States vs. American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1345, the Court used the following language in referring to its function in the interpretation of Statutes:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."

It is our conviction that the problem of interpretation presented by the instant case is easily resolved in view of the provisions of Section 2 of the Act. In Section 2 (a) the Congress declares that it finds "the existence in industries engaged in commerce or in the production of goods for commerce", of labor conditions which produce five enumerated evils. In Section 2 (b) it is declared to be the policy of Congress to correct these evils through the exercise of its power to regulate commerce among the several States.

We submit that a consideration of whether or not the Act is applicable to the facts presented by the instant case begins and could well end with an examination of the limited power exercised by the Congress in the passage of the Act.

The language of Section 2 (b) is practically identical with *Clause 3, Section 8, Article 1 of the Constitution of the United States*.\* The Congress has declared that it acted under a specific provision of the Constitution (although it did not exercise its full power under such provision). The constitutional provision in question authorizes Congress to regulate the commerce of the citizens of the several States; that is, to regulate the commerce

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\* The constitutional clause confers upon Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian Tribes". The language of the Act relevant to this comparison is " \* \* through the exercise by Congress of its power to regulate commerce among the several States".

of the grantors of the power, not the activities of grantee. (*South Carolina vs. Georgia*, 93 U. S. 10, 23 L. Ed. 782).

Had Congress sought to regulate the activities of the United States itself there would have been no need to invoke the commerce clause of the Constitution. The *Walsh-Healey Act*, 41 U. S. C., 35-45, is an example of the regulation by Congress of the hours and wages of employees of Government contractors in which there is no exercise of, or reference to, Congressional power to regulate interstate commerce. The regulation of its own acts is an inherent right of the Government; not a right under the delegated power to regulate commerce. Specific power with reference to the waging of war and the raising and supporting of an army is derived from *Clauses 11 and 12, Section 8, Article 1 of the Constitution*. The fact that Congress based the Fair Labor Standards Act upon power delegated to it by the people of the several States to regulate the commerce of the grantors is conclusive evidence of the limitation of the purpose and scope of the Act to activities falling within the limits of the delegated power.

Even if Congress had not declared that the Act was passed as a result of the exercise of a power too restricted to include the transportation of munitions it is apparent from the Congressional findings and declaration of policy contained in Section 2 (a) that the Congress did not intend the Act to apply to the facts presented by the instant case.

The provisions of Section 2 show that Congress

intended to regulate "commerce" and through the regulation of commerce to regulate "transportation" in the restricted sense of trade, traffic and *competition* by and between the citizens of the Nation, not to regulate Government shipment of Government owned munitions in time of war.

The evils which Congress sought to correct were found to exist "in industries engaged in commerce or in the production of goods for commerce". Government activities at any time, and particularly in time of war, do not fall within any accepted definition of "industry" and certainly not within the definition contained in Section 3 (h), reading:

" 'Industry' means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed."

The five effects of the existing labor conditions which it was the declared Congressional purpose to correct have no relation to the loading and transporting of Government owned munitions under the facts reflected by this record. The attainment of the ends of Government social policy does not require legislative compulsion when the Government pays the bill. Inherent in the Congressional declaration of policy is the legislative purpose to regulate "industry" through the exercise of the constitutionally authorized control of "commerce" in the restricted sense of competitive "transportation". This purpose has no application to the factual situation presented by this record.



- (2) General legislation of the type under consideration is inapplicable to the Sovereign.

Even in the absence of specific exclusion of the Government (Sec. 3 (d) ) the Act could not be interpreted to include it, in view of the principle that general legislation does not include the Sovereign in the absence of an express reference or an unavoidable implication. This principle is stated in *United States vs. Hoar*, 2 Mason 311, in the following language:

"Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed or the language used, that the Government was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law that the general words of a statute ought not to include the Government or effect its rights unless that construction is clear and indisputable upon the text of the Act."

To the same effect see *Dollar Savings Bank vs. United States*, 36 U. S. 227, 22 L. Ed. 80.

- (3) The purpose of the Act is to regulate "commerce" in the restricted sense of trade, traffic and competition.

It seems apparent that the Congress charged with

the knowledge that general legislation does not include the Government under ordinary circumstances, acting by its own declaration under a restricted power which did not include Government transportation of Government owned articles and acting in order to cure the evils enumerated in Section 2 (a) of the Act, could not possibly have intended to regulate transportation by the Government of Government owned munitions. In view of the declaration of policy, the specific exclusion of the Government and considering the general principles of interpretation involved, it is obvious that the word "transportation" in the definition of "commerce" in Section 3 (b) relates to industrial and not to Governmental shipments.

Petitioners' contention that *Executive Order 9301* and the *Portal-to-Portal Act of 1947* (*Public Law 49, 80th Congress Chap. 52*) indicate a contrary Congressional intention is not impressive. The fact that Executive Order 9301, which related to all industry, did not purport to suspend or modify the Fair Labor Standards Act is irrelevant to the problem under consideration. The argument based on the Portal Act ascribes to Congress the function of interpretation which the Constitution vests in the Court.

As previously mentioned, the Congressional declaration of policy found that the existence "in industries engaged in commerce or in the production of goods for commerce" of certain conditions produced enumerated evils and the Act was passed to cure these evils. It seems

apparent that in the passage of the Act Congress had in mind the definition of "commerce" contained in the opinion of this Court in *Carter vs. Carter Coal Company*, 298 U. S. 238, 80 L. Ed. 1160:

"As used in the Constitution the word 'commerce' is the equivalent of the phrase 'intercourse for the purpose of trade', and includes transportation, purchase, sale and exchange of commodities between citizens of a State." \*

As stated, the Act itself shows that Congress intended to regulate "commerce" in the restricted sense of trade, traffic and competition by and between the citizens of the Nation and not to regulate Government shipment of Government owned munitions under the circumstances reflected by the facts of this case. This Court has often pointed out that Congress did not intend to extend the regulations contained in the Fair Labor Standards Act to the furthest reaches of Federal authority. *Kirschbaum Company vs. Walling*, 316 U. S. 517, 86 L. Ed. 1638; *Walling vs. Jacksonville Paper Company*, 317 U. S. 564, 87 L. Ed. 460; *McLeod vs. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1538.

Congressional intention to regulate commerce in a competitive sense is emphasized by the references to competitive conditions contained in Section 8 of the Act relating to wage orders established by industrial committees.

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\* For a scholarly discussion of the historical development of this definition see *Young vs. Kellogg Corporation*, 14 C. C. H. Labor Cases 64,244 (D.C.E.D. Tenn.), holding the Act inapplicable to the production of the atomic bomb.

In its operations at the Louisiana Ordnance Plant respondent was not engaged in *competition*. The cost of the labor and material utilized in complying with its contractual obligations was a matter of indifference to respondent and it did not own or sell the munitions.

A number of decisions of the Court emphasize the fact that the Act regulates commerce in the *competitive* sense.

In *United States vs. Darby*, 312 U. S. 100, 85 L. Ed. 609, the Court said:

"The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in Sec. 2 (a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of *competition* in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the work-



ers of the several states." (emphasis supplied).

.....

"The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of *competition* in the distribution of goods produced under substandard labor conditions, which *competition* is injurious to the commerce and to the states from and to which the commerce flows." (emphasis supplied)

.....

"As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for *competition* by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by *competition* made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of *competition* in interstate commerce which it has in effect condemned as 'unfair', as the Clayton Act has condemned other 'unfair methods of *competition*' made effective through interstate commerce." (emphasis supplied)

.....

"Congress, to attain its objective in the suppression of nation-wide *competition* in interstate commerce by goods produced under substandard labor conditions, \* \* \*." (emphasis supplied)

See also *Brooklyn Savings Bank vs. O'Neil*, 324 U. S. 697, 89 L. Ed. 1296; *Mabee vs. White Plains Publishing Company*, 327 U. S. 178, 90 L. Ed. 607; and *Roland Electric Company vs. Walling*, 326 U. S. 657, 90 L. Ed. 383.

Interpreting the Act the Court has referred to the President's message to Congress in May of 1937, 81 Cong. Rec. 4960, as a result of which the Act was passed. (*Roland Electric Company vs. Walling*, *supra*). Two passages from this message emphasize our contention that the Act was intended to regulate industry in its competitive phase and not the Sovereign acts of the Government.

"Enlightened business is learning that competition ought not to cause bad social consequences, which inevitably react upon the profits of business itself."  
(emphasis supplied)

\* \* \* \* \*

"With the establishment of these rudimentary standards as a base, we must seek to build up, through appropriate administrative machinery, minimum wage standards of fairness and reasonableness, industry by industry, having due regard to local and geographical diversities and to the effect of unfair labor conditions upon competition in interstate trade and upon the maintenance of industrial peace."  
(emphasis supplied)

- (4) Decisions of this Court stating the purposes of the Act show that it is not applicable to such transportation.

In addition to pointing out in the *Darby Case*, *supra*, that the Act under consideration was intended to

regulate commerce in the restricted sense of trade and competition this Court has in subsequent decisions pointed out three other purposes of the Act:

- (1) Through the overtime provision to apply financial pressure to employers to spread employment in order to avoid the extra wages. (*Overnight Motor Transport Company vs. Missell*, 316 U. S. 572, 86 L. Ed. 1682; *Southland Gasoline Company vs. Bagley*, 319 U. S. 44, 87 L. Ed. 1244; and *Walling vs. Helmerich & Payne, Inc.*, 323 U. S. 37, 89 L. Ed. 29).
- (2) To protect certain groups of the population from substandard wages and excessive hours. (*Brooklyn Savings Bank vs. O'Neil*, *supra*; *Schulte vs. Gangi*, 323 U. S. 103, 90 L. Ed. 1114).
- (3) To prevent that segment of the population which is without a strong bargaining power from making private contracts which endanger its health and efficiency. (*Brooklyn Savings Bank vs. O'Neil*, *supra*).

All are inapplicable to the facts of the instant case, the first because of the man power shortage which prevailed during the War effort, the second because of high wages in War plants and Government control of hours of work in this case and the third because the Government paid the wages and controlled the hours of work.

If the Act is held applicable and judgment should go against respondent on the merits the judgment will in the end be paid by the Government. (R. 70, 71, 181). We

would thus have the anomalous situation of the Government imposing a penalty upon itself for failure to comply with a social policy of its own creation.

**THE ACT IS INAPPLICABLE TO THE LITIGANTS AS THE ENTERPRISE IN WHICH THEY WERE ENGAGED WAS THAT OF THE GOVERNMENT, THEIR ACTIVITIES RELATED TO WAR, NOT TO COMMERCE, AND RESPONDENT WAS AN AGENT OR INSTRUMENTALITY OF THE GOVERNMENT IN THE EMPLOYMENT OF PETITIONERS AND THE OPERATION OF THE PLANT.**

**(a) The Enterprise Was That Of The Government.**

"Industry" is not involved in a situation where the Government in the emergency of war employed a contractor to build and operate upon property owned by it a plant for the loading of munitions composed of its own materials. Particularly is this true where the Government determines the type and amount of the munitions to be loaded, ships the finished product for use in its war effort, supplies all funds necessary to pay the employees in the plant, retains a veto power over the employment of individuals, determines the number of employees to be engaged, their hours of work and rates of pay,\* and assumed all financial risk involved. Viewed in the light of the obligations and retained powers of the Government under the contract, it

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\* The statement on page 12 of Petitioners Brief implying that the Government did not control wages or salaries of petitioners finds no support in the opinion below and ignores the contract provisions at pages 51 and 52 of the record.



is apparent that the enterprise was that of the Government and that respondent's function was limited to management, under close Government supervision, of a Government owned plant operated by the Government through the exercise of its war powers.

Since the Act relates to "industry" and excludes the Government (Sec. 3 (d) ) it is apparent that the "transportation" regulated through the definition of "commerce" (Sec. 3 (b) ) <sup>1</sup> is industrial, not Governmental, transportation.

**(b) The Activities Of The Litigants Related To War, Not Commerce.**

The activities of the litigants constituted an integral part of the War machinery. Their work dealt exclusively with munitions, which are articles of war not of commerce. Respondent under direct Government supervision exercised managerial functions and petitioners' work was performed in that branch of the War effort centered at the Louisiana Ordnance Plant.<sup>2</sup>

Petitioners' hours of work, rates of pay, period of

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<sup>1</sup> "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

<sup>2</sup> In a similar situation the Second Circuit Court in *Divins vs. Hazeltine Electronics Corporation*, *supra*, has held that workmen repairing aircraft carriers, battleships and submarines were engaged in the War effort and not in commerce.

employment and the product upon which they worked depended, not upon commercial considerations or any decision of respondent, but upon directions issued by the Army in furtherance of the National War effort.

As the Fifth Circuit Court stated in *St. Johns River Shipbuilding Company vs. Adams, supra*:

"War is not commerce. There can be commerce in war equipment but when the Government itself in the midst of war has produced for immediate use in war at its own expense and in its own shipyards special type vessels as auxiliaries for its navy and to be manned by navy crews, commerce is not involved at all. The Company and its employees knew it was not. The war power of the federal government is its supreme power. When it is in action it is transcendent."

The fact that "commerce" in the restricted sense of trade may be stimulated in time of war is irrelevant to a consideration of the status of persons engaged directly in the Government's War effort.

(c) Respondent Was An Agent Or Instrumentality Of The Government In The Employment Of Petitioners And The Operation Of The Plant.

It is apparent that respondent was the mere agent or instrumentality of the Government, and that under such circumstances the Act is inapplicable because of the Government's immunity under Section 3 (d).

The holding in *Alabama vs. King & Boozer*, 314 U. S. 1, 86 L. Ed. 3, and *Curry vs. United States*, 314 U. S.

14, 86 L. Ed. 9, that Government cost-plus-a-fixed-fee contractors are without right to pledge the credit of the United States does not mean that such contractors cannot be agents or instrumentalities of the Government. It is not necessary that one have the authority to pledge the credit of his principal in order to occupy the status of an agent. *Pennsylvania Dairies vs. Pennsylvania Milk Control Commission*, 318 U. S. 261, 87 L. Ed. 748, is irrelevant to consideration of the question of agency.

The contention that *Alabama vs. King & Boozer* *supra*, is relevant because of its holding that a State may tax sales to a cost-plus-a-fixed-fee contractor notwithstanding the fact that the economic burden of the tax is borne by the United States lacks force in view of the holding in *United States vs. County of Allegheny*, 322 U. S. 172, 83 L. Ed. 1209, the rationale of which is that if a tax levied upon such a contractor imposes a burden upon the Government, it violates the constitutional immunity.\*

It is contended that the contract contains language the effect of which is to designate respondent as an independent contractor. The answer of the District Court (approved by the Circuit Court) to this contention was to look through forms and consider substance. (R. 232). In so looking the District Judge appears to have anticipated the decision of this Court in *Rutherford Food Corporation*

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\* It should also be pointed out that Congress could not in 1938 have had in mind the *Alabama vs. King & Boozer* decision which was rendered in 1941.

*vs. McComb*, — *U. S.* —, 91 L. Ed. 1350, in which the label of "independent contractors" was ignored and the Act applied in view of the factual situation reflected by the record. The Rutherford decision is applicable here and the labeling of an agent as "independent contractor" cannot serve to make him such although the result here will be the opposite of the Rutherford Case—in that here coverage of the Act will be denied.

There are numerous definitions of "independent contractor", all of which are substantially the same. From 27 *Am. Juris.* 486, we take the following:

"The most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. Broadly stated, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor."

Here complete control was vested in the Government and respondent does not qualify as an independent contractor under the above test for the following reasons:

- (1) Respondent was required to operate the Plant as directed by the Government. (R. 44).
- (2) Respondent was obligated to keep at the site a representative to receive and execute the directions of the Government. (R. 76).



- (3) Respondent was reimbursed for its expenditures and held harmless against loss. (R. 47, 70, 71).
- (4) The Government supplied all required material. (R. 45, 88).
- (5) The Government exercised a veto power over the employment of supervisory personnel. (R. 53).
- (6) The Government retained the power to require respondent to reduce its overhead and/or personnel and to increase the hours of work. (R. 34).
- (7) The Government retained the power to require dismissal of employees. (R. 76).
- (8) Respondent's notes and data became Government property. (R. 35).
- (9) Purchases in excess of \$500 and all subcontracts required Government approval. (R. 75, 76).
- (10) The Government, not respondent, paid the cost of reworking faulty material and of material finally rejected. (R. 54).
- (11) The Government reserved the right to pay directly sums due for labor, materials and other charges. (R. 60, 89).
- (12) The contract is subject to termination in whole or in part at the will of the Government. (R. 68, 120).

Respondent's position bore no relation to that of the

true independent contractor who produces a product at a fixed price and is responsible only for the result.

Petitioners cite decisions by this Court holding that isolated contractual provisions similar to certain ones appearing in the contract under consideration are inconsistent with the agency relationship.. No decision is cited, or can be cited, holding that the total retained powers of the Government here do not create an agency relationship between it and respondent.

In *NLRB vs. Atkins & Company*, — U. S. —, 91 L. Ed. 1157, this Court made the following observation with reference to the employer-employee relationship:

"That relationship may spring as readily from the power to determine wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire, or power to control all the activities of the worker."

The relationship of the United States to petitioners meets every test laid down in the foregoing quotation and some additional ones. The Government had the power to determine the wages and hours of petitioners, the obligation to bear the financial burden of petitioners' wages, and it received the benefits of the hours worked. In addition the Government had the power to fire and to control the activities of petitioners.

There are more discernible incidents of the employer-employee relationship between the Government and pe-

petitioners than there were between the Government and the coal miners in *United States vs. United Mine Workers, supra*.

(d) **Answer To The Contention That Respondent Did Not Disclose Its Principal.**

Petitioners contend that there is no showing that they knew the United States or the War Department was involved and that the agency was undisclosed. Our reply to this contention is (a) not being an assigned error it cannot be urged (*Supreme Court Rule 27, Subsection 6*); (b) it assumes a fact neither proven nor discussed; (c) it ignores the references to the contract in the complaint filed by petitioners. (R. 2, 3).

**THE MUNITIONS INVOLVED WERE NOT "GOODS" WITHIN THE DEFINITION OF SECTION 3 (1) OF THE ACT BECAUSE OF THE EXCLUSIONARY PROVISION RELATING TO GOODS IN THE HANDS OF THE ULTIMATE CONSUMER.**

The definition of "goods" is repeated for convenience in considering the above contention.

"'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

(29 U. S C., 203 (i) )

The decision below on the point under consideration finds support in the decisions of the Second Circuit in *Divins vs. Hazeltine Electronics Corporation*, *supra*, and of the Eighth Circuit in *Crabb vs. Weldin Bros.*, 164 Fed. (2d) 797. We are aware of no Circuit Court decision in conflict with the principle here asserted.

The material upon which petitioners worked was at all stages of its processing Government property, located upon Government property and subject to Government supervision. Both respondent and petitioners were powerless to deal with the component parts or finished product except as directed by the Government. Our discussion of this phase of the case assumes, as the Court below in effect found, that the Government's actual physical possession of all materials involved and of the finished product at all relevant times is an incontrovertible fact. As pointed out in *United States vs. County of Allegheny*, *supra*:

"The 'Government' is an abstraction and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor."

Petitioners' contentions in respect to the assertion presently under consideration overlook certain conclusions which are inescapable in view of the above quoted definition of "goods" and the penal provisions of the Statute.

"Goods" as defined is not limited to the final pro-



duct but includes "any part or ingredient thereof". The work of petitioners consequently was performed upon material which was already in the actual physical possession of the "ultimate consumer" and, therefore, by the terms of the Act not "goods".

Any contention that either respondent or the Government was a producer or processor of the finished product resulting in the munitions becoming "goods" within the definition of Section 3 (i) is based on a misconception of the meaning of the exclusionary clause. It is submitted that only the producer or processor who consumes commodities in the production, preservation or transportation of *other* commodities is excluded from the classification of "ultimate consumer" by the language of Section 3 (i). From this it follows that a producer of commodities, who is also their consumer, but does not consume them in the production of "goods" is as much the "ultimate consumer" of the component parts and the finished product as one to whom he sells the finished product.

Any attempt to demonstrate that the munitions were "goods" as defined in Section 3 (i) because they were processed at the Plant impales its proponent on one horn of a two horned dilemma. The Government's "actual physical possession" of the materials is an incontrovertible fact. Either the Government processed the munitions, or it did not. If the Government processed the munitions, it did so through the agency of respondent, and the "agency defense" previously discussed is valid. If the Government

did not process the munitions, they were not "goods" within the meaning of Section 3 (i).

The contention that the exclusionary provision of Section 3 (i) was designed for the sole purpose of immunizing the innocent shipper of goods produced in violation of Section 15 overlooks the fact that by the terms of Section 16 it is only the *willful* violation of Section 15 which subjects a shipper to the penalties provided by the Act. The possibility of the use of injunctive process against the ultimate consumer seems too remote to have been within the legislative contemplation.

The fact that the munitions were in the "actual physical possession" of the Government, "the ultimate consumer thereof" within the meaning of Section 3 (i), at the time of their interstate transportation cannot be denied. It is, therefore, apparent that the munitions at the time of their transportation were not "goods" within the meaning of the Act. From this it follows that under the facts of this case the processing of the munitions did not constitute "production of goods for commerce" within the meaning of Sections 6 and 7 of the Act. The principle just announced would also apply to munitions privately processed and sold to the Government at the plant gate.

We feel that the reasons assigned in *Barksdale vs. Ford, Bacon & Davis*, 70 F. Supp. 690, for concluding that munitions are not "goods" are persuasive and we therefore quote as follows:

"Thus the plaintiff was at all times working on

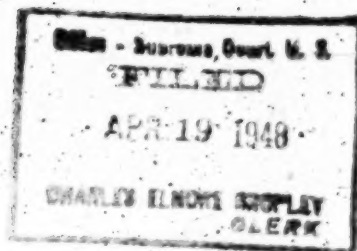
goods of the Government, with machines of the Government, and on Government property, the title to which and the possession of which remained in the United States at all times. After these goods were worked on by the plaintiff, the United States shipped the same under Government bill of lading to military facilities outside of the State. If it can be said that the goods were in the constructive rather than the physical possession of the Government while they were being processed, they were certainly in the actual physical possession of the Government when they were shipped. The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence the United States in our opinion was the ultimate consumer thereof within the meaning of the Act, and the plaintiff was not engaged in the 'production of "goods" for commerce'."

The argument that some of the munitions may have reached our Allies finds no support in the record. The suggested remand to take evidence on this point would serve no purpose as neither respondent nor petitioners, upon whom the burden of proof would lie, could possibly hope to trace into the hands of our Allies specific bombs and shells which as property of the Government were, by its direction, originally shipped to its Armed Forces.

It is submitted that the judgment of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,  
CHARLES D. EGAN  
Attorney for Respondent.

FILE COPY



No. 590

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**In the Supreme Court of the United States**

OCTOBER TERM, 1947

HARRIS KENNEDY, ET AL.,

Petitioners,

vs.

SILAS MASON COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**REPLY BRIEF OF RESPONDENT TO THE BRIEF  
FOR THE UNITED STATES**

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**REPLY BRIEF OF RESPONDENT TO THE BRIEF  
FOR THE UNITED STATES**

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## **THE ISSUE RESTATED**

There are many things which might be said of the brief which has been filed in this case by the Solicitor General. That he should support a claim which, if it succeeds, will have to be paid by the Government is remarkable enough; that he should do so over the protest of the Department directly responsible for the transaction out of which the

claim arose is extraordinary;<sup>1</sup> and that he should do so in the teeth of decisions of federal courts in all parts of the country, including three appellate courts, is little short of astonishing.<sup>2</sup>

But all of these circumstances seem of minor importance beside the fact that the brief of the Solicitor General fails to discuss the real issue in the case. This court is not

<sup>1</sup> The Department of the Army strongly urged the Department of Justice to support the position taken by the respondent in this case. What is more, the Assistant Secretary of the Army submitted to the Solicitor General the record and brief in a case arising under identical circumstances which is now pending on appeal in the Eighth Circuit. That case is *Aaron v. Ford, Bacon & Davis, Inc.*, No. 13,660—Civil, and some of the pertinent facts set out in that record may be found in the opinion filed by District Judge Lemley in the companion case of *Barksdale v. Ford, Bacon & Davis, Inc.* (E.D. Ark.), 70 F. Supp. 690 (1947). In view of the facts so clearly and forcibly presented by the record and brief in the *Aaron* case, it is difficult to understand how the Solicitor General found it possible to make some of the arguments advanced in the brief which he has filed in this case. It will not do to say that these facts are not in this record. As will hereafter be shown, they are embodied in official instructions and documents applicable to all cases of this character.

<sup>2</sup> The attempt made in the Solicitor General's brief to show that the Fifth Circuit stands alone against an overwhelming array of authority is based on a complete misconception of the issues involved in this case. The Second Circuit has reached an identical result on a similar state of facts. See *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (1947). The decision of the Ninth Circuit in *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (1938), on a related question is in accord. Among many District Court decisions *Lynch v. Embry-Riddle Co.*, (S.D. Fla.), 63 F. Supp. 992 (1945); *Barksdale v. Ford, Bacon & Davis, Inc.* (E.D. Ark.), 70 F. Supp. 690 (1947); and *Young v. Kellex Corp.*, 14 C.C.H. Labor Cas. 64, 244 (E.D. Tenn. 1948), may be selected as typical. The dictum to the contrary in *Bell v. Porter* (C.C.A. 7), 159 F. (2d) 117 (1946), was wholly gratuitous, as the parties there had stipulated that the complaining employees were covered by the Act. See *Bell v. Porter* (N.D. Ill.), 66 F. Supp. 49, 53 (1946).



now called upon to determine what is or is not "commerce" in the constitutional sense, nor need it decide whether the Taft-Hartley Act may regulate labor disputes at Oak Ridge or the Wagner Act reach unfair labor practices at a gold mine, nor are petitioners here asking the Court to write any far-reaching exemption into the Fair Labor Standards Act. They are simply asking affirmance of the judgment below on the narrow issue presented by this record which may be shortly stated as follows:

The Act of July 2, 1940, Chapter 508, 54 Stat. 712, authorized the War Department, in the execution of the National Defense Program, to construct new facilities for the development, manufacture, maintenance and storage of military equipment, munitions and supplies and to provide for the operation and maintenance of such facilities "either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them". [Italics supplied] In order to supply the armed forces with munitions needed for combat, the War Department built on Government-owned property a facility known as the Louisiana Ordnance Works, designed for the loading of shells and bombs, and contracted with the respondent to operate that facility under the direction of a representative of the Chief of Ordnance. Were the provisions of the Fair Labor Standards Act applicable to the employees engaged in that operation?

That is the question which the lower courts answered in the negative. It is submitted that when the provisions of the Act of July 2, 1940, and of the Fair Labor Standards Act of 1938 are read together, and when to each is given their proper effect, the correctness of the conclusion reached below is apparent. In this connection it may be helpful

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if some outline is given of the circumstances which led to the passage of the Act of July 2, 1940, as well as to the exact nature of the arrangement made by the War Department with the respondent for the operation of the Louisiana Ordnance Works.

### THE ACT OF 1940

When, in the early summer of 1940, it became apparent that a broad program of preparation for war had to be undertaken, the Chief of Ordnance took stock of the facilities available for the production of ammunition. At that time there was no private industry engaged in the production of large ammunition. The only source available was the Government arsenal at Picatinny, which was little more than a pilot operation.<sup>a</sup>

Obviously, expansion of facilities was imperative, but the question remained how the expanded facilities were to be operated. It was out of the question for the Ordnance Department to undertake to do so. The men who possessed the managerial skill to conduct such an enterprise were not in uniform, and there was no way to get them there, nor could they be induced to accept civilian employment. The rigidity of the classified service, the disqualifications attendant upon Government employment, and the

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<sup>a</sup> Authority for this statement and others made in this section of the brief may be found in the book published by Major General Levin H. Campbell, Chief of Ordnance, entitled "The Industry Ordnance Team". See especially pages 101, et seq. Another valuable reference is the report made by Representative Albert J. Engel which was published in Army Ordnance Report No. 6, August 21, 1944, under the title "Ordnance Ammunition Production". See also "Shot, Shell and Bombs", Fortune Magazine, September, 1945. The most graphic account of the situation which existed in 1940 is to be found in a speech made at the Engineers Club of St. Louis on March 16, 1944, by Colonel T. C. Gerber, Field Director of Ammunition Plants. Excerpts from this speech will be found as Appendix A to this brief.

small compensation which could be paid were insurmountable obstacles. The only possible solution was to devise an arrangement which would preserve the essentials of Government control and direction without giving up the flexibility and freedom of private operation.

There was obviously no existing legal authority for carrying out such a program. At that time War Department procurement was rigidly controlled by statutory provisions and regulations designed to insure the maximum of competition. Such authority as existed for deviating from the straight and narrow path of advertisement for bids was strictly limited.<sup>4</sup> Moreover, any attempt to cross the line between Government and private operation of a Government-owned facility obviously required legislative sanction. The long struggle over the operation of the dam at Muscle Shoals indicates the nature of the issues involved in any such program.

The War Department, therefore, drafted and presented to Congress the legislation which later became the Act of July 2, 1940. The relevant portions of the text are as follows:

**"An Act To expedite the strengthening of the national defense**

***"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War***

<sup>4</sup> A general idea of the restraints which applied to War Department procurement in 1940, may be obtained by reading the provisions of Series 5 of the Army Regulations and particularly AR 5-50, 100, 140, 160, 200, 220, 240, 260, 300, 320, 349, 360. Most of these will be found in the Code of Federal Regulations (1938) Chapter VIII, Part 10.

Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; U.S.C. Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section:



**Provided further, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.**

**"(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them [Italics supplied], and, when he deems it necessary in the interest of the national defense to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).**

**"(c) Whenever, prior to July 1, 1942, the Secretary of War deems it necessary in the interest of the national defense, he is authorized, from appropriations available therefor, to advance payments to contractors for supplies or construction for the War Department in amounts not exceeding 30 per centum of the contract price of such supplies or construction. Such advances shall be made upon such terms and conditions and with such adequate security as the Secretary of War shall prescribe."**

**"Sec. 4 (b) Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided, That under such regulations as the***

Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

Upon this legislation and a similar Act applicable to the Naval Department, there was erected an entirely new form of economic activity dedicated wholly to the production of war material. By virtue of its provisions, an amalgamation of governmental and private activities was achieved which was quite outside of the scope of anything previously known to our institutions. Under Secretary of War Robert P. Patterson and Assistant Secretary of the Navy Ralph A. Bard described the situation strikingly in a Statement of Labor Policy issued by them on July 18, 1942, with the approval of William Green, President of the American Federation of Labor, and Philip Murray, Chairman of the Congress of Industrial Organizations. This statement is of such vital importance to the issue presented in this case that it has been reproduced in full as Appendix B to this brief.<sup>5</sup> Two paragraphs will bear reprinting:

"Congress has charged the War and Navy Department with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves oper-

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<sup>5</sup> The statement was later published in the War Department Labor Operations Manual issued by Headquarters, Army Service Forces, under date of 15 May, 1943. According to an article published in the New York Times on July 19, 1942, Messrs. Joseph A. Padway and Henry Kaiser, counsel for the American Federation of Labor, Mr. Lee Pressman, counsel for the C.I.O., and Mr. Allan S. Haywood, Organization Director of the C.I.O., participated in the preparation of this statement.

ating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

"All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. *These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.*" (Italics supplied.)

## THE GOCO PLANTS

The Ordnance Department was a major participant in the program described in the paragraphs which have been quoted from the Statement of Labor Policy.<sup>1</sup> Indeed, as soon as the necessary legislative authority was available, the Chief of Ordnance proceeded with the development of what Colonel T. C. Gerber, the Field Director of Ammunition Plants, has described as "procedures for the joint management by industry and the Ordnance Department of the ammunition program".<sup>2</sup> At strategic locations throughout the country, facilities were erected designed to supplement the production of Government arsenals.<sup>3</sup> To provide for their operation, contractual arrangements were made with private firms which had special experience in recruiting, housing, training, and servicing great masses of men of varied skills who were engaged in the performance of a special task.<sup>4</sup>

The arrangements with these firms all followed a pattern prescribed by instructions issued by the Under Secretary of War and the Chief of Ordnance.<sup>5</sup>

<sup>1</sup> See Appendix A to this brief, (P. 32).

<sup>2</sup> See Appendix A to this brief, (P. 29). A complete list of all of these facilities will be found in Ordnance Procurement Instructions (paragraph 57,200.7). These instructions, which were issued from time to time by the office of the Chief of Ordnance, were given wide public circulation and may be found in the services published by Commerce Clearing House, Inc., and Prentice-Hall Corporation during the war years. They are hereinafter referred to as OPI.

<sup>3</sup> See Appendix A, (P. 29).

<sup>4</sup> The instructions issued by authority of the Under Secretary of War were known as War Department Procurement Regulations and were published from time to time in the Federal Register. The instructions issued by authority of the Chief of Ordnance were known as Ordnance Procurement Instructions. See Note 7, *supra*.



The outstanding features which were common to each arrangement were as follows:

1. The facility was in each instance located on Government-owned property which the Secretary of War had proclaimed as a military reservation.<sup>10</sup>

2. The military reservation and all activities conducted within its boundaries were under the control of a commanding officer designated by the Chief of Ordnance. This commanding officer was also designated as the contracting officer's representative for the purpose of administering the contract for the operation of the facility.<sup>11</sup> The duties of this officer included "safety and defense of the station (including Military Intelligence and Sanitation); preservation and proper application and use of public property; correction of irregularities and extravagances he may discover, or which may be reported to him; protection of the public interest in all matters relating to the administration of the contract and operation of the plant, works, or depot; certification of vouchers and purchase orders; and accountability and responsibility for public property".<sup>12</sup>

3. The entire plant and equipment were at all times owned by the Government.<sup>13</sup> Furthermore, all materials,

<sup>10</sup> See OPI Part 57, Section C, and particularly paragraph 57,200.7 which contains a complete list of establishments (including the Louisiana Ordnance Works involved in the present case) where the Federal Government had attained exclusive jurisdiction and over which the Chief of Ordnance retained responsibility in plant protection matters. Counsel have been informed by the Department of the Army that the Louisiana Ordnance Works was a reservation which contained 16,321.3 acres of land.

<sup>11</sup> See OPI paragraph 50,002.1.

<sup>12</sup> See OPI Section 50,002.1.

<sup>13</sup> This was true of the Louisiana Ordnance Works (R.21). In some instances the contractor which constructed and equipped the plant also operated. In other cases operation was conducted by contractors in plants previously constructed by the Government.

components and supplies which were used in the process of, or entered into, the completed product, belonged at all times to the Government and were in the possession of representatives of the Government before ever they came into the hands of the contractor. The contracts generally required the Government to furnish a large part of the materials, components and supplies required for the operation.<sup>14</sup> As to materials, supplies or components purchased by the contractor, the contract contained explicit provision that title should pass to the Government at the point designated by the contracting officer, and the contracting officer was specifically instructed to designate the point of origin.<sup>15</sup> Furthermore, all such items were, by War Department regulations, required to be shipped to the commanding officer (sometimes in this connection called the Ordnance Property Officer) at the plant, as consignee, at Government freight rates, on Government bills of lading, or on commercial bills of lading subsequently converted to Government bills of lading.<sup>16</sup> That officer thereupon became accountable for the items as Government property.<sup>17</sup>

4. All completed products were stored on the premises (that is to say, on the military reservation) or shipped by the Transportation Officer stationed at the plant to mili-

<sup>14</sup> Thus in the case of the Louisiana Ordnance Works, the Government was obligated to furnish all metal parts, explosives, and containers (R. 45).

<sup>15</sup> See War Department Procurement Regulations, Section 1182-C and OPI paragraph 50,105. Such a provision is to be found in the respondent's contract for the operation of the Louisiana Ordnance Works (R. 89, 101).

<sup>16</sup> See OPI paragraph 50,105.3.

<sup>17</sup> See War Department Technical Manual, TM 14-910 (Dec. 1, 1944) at pp. 4 et seq.

tary installations under forms of bills of lading prescribed by War Department instructions.<sup>18</sup>

5. The War Department had at all times complete control over the operations of the facility. It prescribed the specifications of the articles to be made, it determined the rate of production, and it dictated the method and manner of manufacture. Production orders were accompanied by detailed drawings and specifications and by a step-to-step manufacturing procedure.<sup>19</sup> All this was done by virtue of

<sup>18</sup> See OPI paragraph 53,005. See also War Department Technical Manual 55-550 and particularly the form of bill of lading shown on page 14 used for the shipment of completed products from the Kentucky Ordnance Works. In this connection the Army Service Forces Manual M-410 entitled "Vendor's Shipping Document" is also pertinent. The Solicitor General seeks to draw a contrary inference from certain provisions of the contract. See Government's brief, page 28, Note 15. But whatever the contractor might have been called upon to do by virtue of those contract provisions, the official instructions issued by the War Department make it perfectly clear that all shipments of completed products were made by the Transportation Officer as shipper.

<sup>19</sup> The extent of the control exercised is clearly shown in the following excerpt which is taken from Volume V, Historical Report, Army Service Forces, Office of the Chief of Ordnance, Field Director of Ammunition Plants, "History of the Loading Section", Period 1942 to September, 1945:

"The tremendous job to be performed by the Loading Section might be better described by starting with the approval for line layouts, construction and completion of the loading lines including complete tooling. As each loading line was completed, a representative of the Loading Section was present for the pre-operation and inspection from an operation and safety standpoint. At this point, token schedules for various items of ammunition were issued to the loading plants. Together with these schedules, there was issued to the plants by the Loading Section complete loading instructions in the form of a letter of Detailed Instructions for new loading, consisting of all applicable drawings, standard practice sheets (later, these became Standard Practice Manuals) and special instructions. Through visits to the loading plants by the various personnel of the

contractual provisions under which the contractor agreed to operate the plant "as directed from time to time by the contracting officer and in accordance with the current applicable specifications to be furnished by him."<sup>20</sup>

6. The contracts established no production schedule and the contractor's compensation was in no case dependent upon the quantities produced. The contractor agrees to operate the plant as directed by the contracting officer, and the Government agrees to pay him, in monthly installments, a fixed fee.<sup>21</sup>

7. The wage policies to be followed by the contractor were determined by the War Department, primarily through the commanding officer at the plant as its representative.<sup>22</sup> After the passage of the Emergency Price Control Act, these policies continued to be determined by the commanding officer, subject to review by the War Depart-

Loading Section, technical advice was given on changes in equipment and line layouts and assistance in all loading problems. It was not unusual for the technical personnel of the Loading and Assembly Group to follow through to completion the loading of a pilot lot of ammunition and then proceed to the proving ground to observe its testing. After completion of proving ground testing, the representative of the Loading and Assembly Group in many cases would return to the loading plant to institute new loading changes or techniques required for regular production of quality ammunition or components."

This is more fully developed in Volume I, General History, Office of the Field Director of Ammunition Plants, prepared by the office of the Chief of Ordnance. Excerpts from that publication will be found in Appendix C to this brief. (P. 38).

<sup>20</sup> Similar provisions are found in the respondent's contract (R. 44, 45).

<sup>21</sup> (R. 44, 46, 47, 62). In this connection, it should be noted that operations during the years 1944 and 1945 (during which petitioners claims arose) were conducted pursuant to express agreement that respondent would continue with the operation of the plant "as directed from time to time by the Contracting Officer, in accordance with production schedules" (R. 143, 167).

<sup>22</sup> See paragraph 8, Statement of Labor Policy, Appendix B, (P. 34). See also OPI paragraph 9, 107 et seq.



ment and ultimately by the National War Labor Board or the Commissioner of Internal Revenue, as the case might require.<sup>23</sup> This control was much more than nominal. Before a single dollar was paid in wages, the contractor was required to submit to the commanding officer a job classification and wage rate schedule.<sup>24</sup> After approval, the contractor was required to comply literally with this schedule. The commanding officer could discharge any employee and could approve or disapprove the hiring or firing of any employee.<sup>25</sup> On certain types of employees specific written approval of the hiring and firing was required.<sup>26</sup> The hiring

<sup>23</sup> The relevant provisions of the Emergency Price Control Act are found in 50 U.S.C. Sec. 901-924. Executive Order 9250, as amended by Executive Order 9381 (8 Federal Register 13083) provided that the National War Labor Board should be the agency of the Federal Government authorized to carry out the wage policies stated in the order or the directives on policy issued by the Economic Stabilization Director under the order. Authority to pass on wage and salary adjustments of employees whose salaries were not fixed by statute was granted by the National War Labor Board to the Secretary of War by General Order No. 14, adopted November 24, 1942, as amended August 17, 1943, 8 Federal Register 11651. By the same General Order the National War Labor Board delegated to the Secretary of War, to be exercised on his behalf by the Wage Administration Section within the Industrial Personnel Division Headquarters, Army Service Forces (usually referred to as the "War Department Agency"), the power to rule upon all applications for wage and salary adjustments (in so far as approval thereof was a function of the National War Labor Board) covering civilian employees within the continental limits of the United States employed at Government-owned privately operated facilities of the War Department.

<sup>24</sup> See OPI paragraph 9,107, et seq. See also Appendix B, (P. 34).

<sup>25</sup> The Statement of Labor Policy found in Appendix B states that "the Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest". The standard contract provisions, to be found in respondent's contract, provided likewise (R. 76).

<sup>26</sup> See Circular No. 15, Headquarters, Army Service Forces, 17 March, 1943, subject: Auxiliary Military Police.

of every employee and all changes of status, either in classification or wage rate, had to bear the written approval of the contracting officer. In the absence of specific approval, no reimbursements could be obtained.<sup>27</sup> Checkers were maintained in clock houses where employees reported in and the Government audited and approved the time cards.<sup>28</sup> The Government even maintained men to observe payroll payments to the employees.<sup>29</sup>

8. The contractor had no financial stake in the contract. The Government agreed to bear all costs, and all expenditures were made from a fund advanced by the Government.<sup>30</sup> The contract sedulously shielded the contractor from any liability.<sup>31</sup>

9. The Ordnance Department assumed responsibility for plant protection, safety, and insurance.<sup>32</sup> In fact, the Safety Manual prescribed by the Ordnance Department contained detailed provisions regulating the conduct of employees, what they might carry, when and where they might smoke, the type of shoes to be worn, how to launder their uniforms, etc.<sup>33</sup> In this connection OPI 9,101.1 states that "the War Department has the responsibility to see that each plant is

<sup>27</sup> See OPI paragraph 9,107 et seq. See the provisions of the respondent's contract (R. 51, 116).

<sup>28</sup> See War Department Technical Manual 14-1000, Chapter 2, Section VI.

<sup>29</sup> See Manual for the Administration of Contracts, War Department, Office of the Chief of Ordnance, Fiscal Division Bulletin No. 8. See also Decision of Comptroller General B-22235, dated December 19, 1941.

<sup>30</sup> The standard provisions to be found in respondent's contract so provided. See (R. 51, 64, 116).

<sup>31</sup> See Article V-A, 1, (R. 54), and Article VII-A and B, (R. 70, 71).

<sup>32</sup> See War Department Procurement Regulations, Sections 332, 365.1; 365.1-A, 434, and OPI paragraphs 4060 et seq.

<sup>33</sup> See Ordnance Safety Manuals, December 1, 1941, and May 3, 1945.

operated in accordance with all laws and Executive Orders and in such a manner as to provide for the safety and protection of the plant and its personnel, and to insure maximum production at a reasonable cost."

10. The War Department could at any time terminate the contract and operate the plant with its own employees or through another contractor (R. 68, 120).

The arrangements made for the operation by the respondent of Louisiana Ordnance Works fell directly into the pattern which has been described. All of the characteristic features of the GOCO contract were present in this case. There was no deviation; indeed, under War Department instructions, none was possible. There were, it is true, certain provisions of the contract which were not entirely appropriate to the peculiar nature of the operation. The Solicitor General has made much of these in an effort to show that the relationship between the Government and the respondent was in no way unique. However, this attempt to make capital out of "boiler plate" provisions in the contract overlooks certain significant facts.

War Department contracting during the years from 1941 to 1945 was a mass production industry in itself. There was no time to make contracts to order with all the negotiation and haggling over draftsmanship which would inevitably be involved. It was necessary to devise standard contractual provisions and to require their inclusion without deviation. Inclusion of these provisions was at times mandatory.<sup>34</sup> In other cases the provisions were employed only when appropriate but in such cases had to be used without deviation.

<sup>34</sup> e.g. the Walsh-Healey clauses, the renegotiation clause, the termination clause, the inspection clause, from all of which the Solicitor General seeks to draw inferences. As to the mandatory character of these provisions, see War Department Procurement Regulations No. 3 *passim*.

The fact is that the basic features of the arrangement between respondent and the Government for the operation of the Louisiana Ordnance Works were identical with those which existed in the case of the Arkansas Ordnance Plant which was considered in *Barksdale v. Ford, Bacon & Davis, Inc.*, (E.D. Ark.), 70 F. Supp. 690 (1947). The findings of fact made in that case are, therefore, of special interest. See especially the following passage from the opinion of the court, at page 693:

"The Arkansas Ordnance Plant was in its entirety the property of the United States. Practically all of the materials that went into the munitions were furnished by the Government and were shipped to the plant as the property of the United States, for military use. This included powder, metal and other materials that formed a part of the munitions. This was known as free issue material. The remaining materials, which were used in the main in the fabrication, packing and shipment of the munitions, were purchased by the defendant from outside sources, and all these materials became the property of the Government at the point of purchase, and were shipped from the point of purchase to the Ordnance Property Officer, care of Ford, Bacon & Davis, Inc., Arkansas Ordnance Plant, Jacksonville, Arkansas. Thus the plaintiff was at all times working on goods of the Government, with machines of the Government, and on Government property, the title to which and the possession of which remained in the United States at all times. After these goods were worked on by the plaintiff, the United States shipped the same under Government bill of lading to military facilities outside of the State. If it can be said that the goods were in the constructive rather than actual possession of the Government while they were being processed, they were certainly in the actual physical possession of the Government when they were shipped. The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war."



## ARGUMENT

### I.

#### **The Fair Labor Standards Act Construed in the Light of the Act of 1940 is Plainly Inapplicable.**

It is not necessary to enter into a logomachy with the Solicitor General over the meaning of particular words or phrases in the Fair Labor Standards Act in order to demonstrate its inapplicability to the kind of operation which has been described in the preceding section.

One thing is plain enough: The GOCO operation bears no relation to the economy which the Fair Labor Standards Act was designed to regulate, nor could it have been productive of the abuses toward which the Act was directed. There was no possibility of the pressure of the unfair competitor willing to exploit his employees and thus to depress labor standards generally.

In fact, the situation created as a result of the passage of the Act of 1940 was in many respects *sui generis*. The contracts entered into by virtue of that Act inaugurated something entirely new. Since the Government remained in complete control of the wage policies followed by the contractors who were operating GOCO plants, there was no possibility of the payment of substandard wages or of working excessive hours except by direction, and with the full consent, of the Government itself. In the movement of shells and bombs across state lines, the element of competition with other goods was wholly absent. The Government was the only customer, and the interstate movement was for but one purpose, to arm the combat forces of the United States.

When Congress gave the legislative authority for this "new and unique tripartite relationship among Govern-

ment, labor and management", there is no doubt that the question of maintaining labor standards in connection with these operations was given careful consideration. Where the Secretary of War elected to operate Government-owned facilities by means of Government personnel, the provisions of Section 2(b) insured the payment of overtime for hours worked in excess of forty hours in any work-week. Where, on the other hand, the Secretary of War elected to operate the Government plant "through the agency of selected qualified commercial manufacturers", the situation was dealt with by the proviso intended to insure the continued application of the Walsh-Healey Public Contracts Act.<sup>49</sup> Congress thereby indicated its intention that labor standards should be maintained in all of these operations, whether conducted directly by the War Department or through private contractors.

In this connection the legislative history of the Act of July 2, 1940, is of some interest. As originally passed by the House, the bill contained no provision relating to labor standards.<sup>50</sup> As amended in the Senate, the bill contained the express provision that all contracts entered into by virtue of its provisions should be subject to the provisions of the Walsh-Healey Law.<sup>51</sup> In conference, it was realized that the effect of the Senate amendment would be to work a radical change in the prevailing labor standards in many industries to which the Act would be applicable, particularly the construction industry which for many years had been otherwise regulated. For this reason the conferees

<sup>49</sup> 49 Stat. 2036, 41 U.S.C. §35-45.

<sup>50</sup> See House of Representatives, Report No. 2261, 76 Congress, Third Session.

<sup>51</sup> See House of Representatives, Report No. 2685, 76 Congress, Third Session, "Statement of the Managers on the Part of the House."

modified the language to the form in which it was ultimately enacted.<sup>24</sup>

Thus it seems clear that Congress intended to prescribe in the Act itself, the labor standards to be applied in the new field of activity into which it was authorizing the War Department to enter. This intention to deal comprehensively with the entire subject seems clear when the Act is read in its entirety. It follows that the Fair Labor Standards Act of 1938 and the Act of July 2, 1940, are in *pari materia*, and must be read together. When this is done, it seems quite apparent that, putting aside for the moment the question whether the Fair Labor Standards Act could by its terms have any application, the Act of 1940 clearly intended to remove from the ambit of the prior law, the operations conducted by respondent at the Louisiana Ordnance Works.

*United States v. Hutcheson*, 312 U. S. 219 (1941), is directly in point. There this Court found that Congress, in enacting the Norris-LaGuardia Act, effectively removed certain activities of labor unions from the scope of the Sherman Act, although no explicit provisions to that effect could be found in the later statute. This Court said (at p. 235):

"Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require

<sup>24</sup> See Note 37.

as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' *Johnson v. United States*, 163 F. 30, 32."

See also the remarks of Judge LEARNED HAND in *United States v. Aluminum Company of America* (C.C.A. 2), 148 F. (2d) 416 (1945) at page 429.

But in addition to the principles so plainly stated in the *Hutcheson* case, there are other reasons for believing that this Court should not apply the Fair Labor Standards Act of 1948 to arrangements made under the Act of 1940. It is a familiar rule that a statute is to be read in the light of conditions existing at the time of its consideration and passage and is not to be mechanically applied to activities not then foreseeable. The recent case of *Atlantic Coast Line v. Phillips*, 332 U. S. 168 (1947) illustrates this rule in a very apt way. There, words in a statute exempting the railroad from taxation were held not to include an income tax subsequently imposed by the legislature. This Court pointed out that the meaning of the earlier statute could not be found unless it was "viewed as a part of the whole texture of local laws and of the economy to which they apply."

Here there can be no doubt that Congress, in 1937 and 1938, when the Fair Labor Standards Act was under con-



sideration, was dealing with an economy radically different from that which was inaugurated by the Act of July 2, 1940. No such improvisation as the GOCO plan could have entered the minds of the legislators. It required the spur of grim necessity applied to the imagination of resourceful administrators to produce such a phenomenon. These, it is submitted, are compelling reasons for concluding that respondent's activities in operating the Louisiana Ordnance Works for the War Department, were wholly outside the scope of the Fair Labor Standards Act.

In adopting the construction now urged, this Court will not be exposing employees of contractors who operated GOCO plants to the rapacity of unscrupulous employers. The provisions of the Walsh-Healey Act are sufficient to insure against any such result.<sup>39</sup> Apart from this statute, the control exercised by the Government over the wage policies at GOCO plants was in itself a sufficient guarantee of protection. In this connection, reference is made to the detailed provisions of the Statement of Labor Policy to be found in Appendix B (pp. 35-37). The policies there announced were made applicable to GOCO contracts through the administrative powers of the contracting officer and his representatives. Similarly, the provisions of Executive Order No. 9240,<sup>40</sup> which added a double time premium for work done on the seventh consecutive day, were applied in all GOCO plants.

## II.

### **The Act Is Inapplicable According To Its Terms.**

It would serve no useful purpose to repeat here the arguments which have been made in the brief previously

<sup>39</sup> The fact that the Act is not applicable under contracts under \$10,000 need give no concern. All of these contracts were dealing with vastly larger sums.

<sup>40</sup> Code of Federal Regulations, Cum. Supp. Book I, p. 1207.

filed on behalf of respondent or in the briefs filed as *amici curiae* by a number of contractors. We think that they show that the petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. We especially endorse the argument advanced on behalf of E. I. duPont De Nemours & Company. The analysis there made of the legislative history of the Fair Labor Standards Act of 1938 and its progenitors seems to us to show conclusively that, independently of the effect of the Act of July 2, 1940, the Fair Labor Standards Act was never intended to apply to the manufacture from Government-owned materials, in Government-owned plants, of shells and bombs subsequently shipped by the Government to military installations.

A word, however, might be said about the attempt of the Solicitor General to escape from the exemption, plainly written into the Act, of goods which are in the actual physical possession of the ultimate consumer. That this exemption applies in literal terms to the goods produced in the Louisiana Ordnance Works can hardly be doubted. The goods were clearly in the physical possession of the Government before they crossed state lines. They were delivered to the Government, inspected, finally accepted, and shipped by a Government officer as shipper on Government bill of lading, at freight rates available only to the Government.

The Solicitor General argues that the proper construction of the statute does not exempt those producing goods which are delivered into the physical possession of the ultimate consumer prior to their movement across state lines. This argument is inconsistent with the legislative history of the Act as well as with its literal meaning. The real intention of the ultimate consumer provision was

clearly stated by Mr. Robert H. Jackson in testimony given on June 12, 1937, before the joint committee considering the Administration's draft of the Fair Labor Standards Act.<sup>41</sup> At that time, the bill contained no exemption of retailers, and Mr. Jackson was being pressed as to the applicability of the Act to small business men such as bakers and shoemakers whose products might move across state lines. The pertinent testimony is as follows:

"The Chairman. . . . Would you explain under just what circumstances and under what circumstances only, it would be possible for the regulation of retail establishments and small business enterprises to come under this bill?

"Mr. Jackson. I will try to. It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the pants presser and small business generally. . . .

But then, there are only two ways in which a retailer, for example, would be affected by this bill as it now stands. . . . One would be the retailer who is located close to a State line and sold his goods by delivery across a State line, and the other would be the case of a local retailer, who by his labor practices and standards was able to affect the interstate movement of goods. . . .

Practically, the situation in which a local merchant might be affected would be if he were moving his goods in the course of delivery across the State line to a substantial extent so that he were engaging in inter-

<sup>41</sup> Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong. 1st Session on S. 2475 and H.R. 7200, at page 35.

state commerce; but generally speaking, the policy of the bill is not to include the *service trades* and *small business* and the retailing enterprises.

“\* \* \*

As a practical proposition, the bill does not affect the retail trades. (*Italics supplied*).”

The assurances of the Assistant Attorney General that retailers who did not themselves deliver across state lines would be exempted from the Act must have been based on the ultimate consumer clause as no other basis for them existed in the bill in its then form. These representations made to the Congress by a representative of the administration which had drafted the bill and arranged for its introduction should be given great weight.

The argument now advanced by the Solicitor General would limit the exemption in such a way as to destroy it. No express exemption was necessary to protect an innocent ultimate consumer moving goods across state lines from injunctive process and penalties. Nor is it to be supposed that Congress intended to immunize ultimate consumers who knowingly contributed to violations of the Act. To give the exemption meaning, it must, therefore, apply under the circumstances outlined by Assistant Attorney General Jackson.

The Administrator's rulings to the contrary are not persuasive. Interpretative Bulletin No. 5 is primarily based on the theory that a consumer who uses commodities in connection with the production or shipment of other goods for commerce is not the ultimate consumer. Thus “the ultimate consumer of a shoe box is not the manufacturer of the shoes, but the man who buys and wears the shoes”. This is the ground on which the cases relied on by the



Solicitor General such as *Hamlet Ice Co. v. Fleming* (C.C.A. 4), 127 F. (2d) 165 (1942) are to be explained. That theory alone would restrict the exemption so narrowly as to make certain that no substantial body of employees would be denied the benefits of the Act. Thus for practical purposes the question for the Court here to decide is whether the Act is to be applied to Government purchases and transportation. Clearly, the provisions of the Walsh-Healey Act and of the Bacon-Davis Act<sup>42</sup> are adequate to care for employees concerned in the production of such goods.

But even if the contention of the Solicitor General that the Act exempts only employees of the ultimate consumer who perform work after the goods come into his physical possession could be sustained; the facts in this case still require the conclusion that the exemption applies. Not only were the materials from which these shells and bombs were produced at all times owned by the Government, but, under the circumstances which have been outlined, they were plainly in the physical possession of the Government. As has been shown, the great bulk of the materials and supplies were actually furnished by the Government. The balance were shipped to an officer of the Government as consignee, and that officer became immediately accountable for them as Government property. The extraordinary extent of the control exercised by the Government over the contractor during the loading process has already been shown. The case, it is submitted, is, in all essential respects, similar to that dealt with by the Second Circuit in *Divins v. Hazeltine Electronics Corporation*, 163 F. (2d) 100 (1947). The Solicitor General argues that the Government would then be the manufacturer of the article, but if so, it is exempt under Section 3 (d), compare *United States v. United Mine Workers*, 330 U. S. 258 (1947).

<sup>42</sup> 40 U.S.C. §321 et. seq.

**CONCLUSION**

We are not asking this Court to give any weight to the fact that the petitioners are seeking to add to the already staggering cost of the recent war. Nor are we asking the Court to give consideration to the obvious fact that the compensation paid petitioners took fully into account the fact that they were expected, as were all others engaged in war production, to work overtime. Those are considerations not relevant here. We are asking only that the Court give effect to the Act of 1940, and that it construe the Fair Labor Standards Act in the light of its legislative history and in accordance with its express language.

Respectfully submitted,

**WILLIAM L. MARBURY,**  
**CHARLES D. EGAN,**  
Counsel for Respondent.

## APPENDIX A

EXCERPTS FROM SPEECH ENTITLED "THE GOVERNMENT-OWNED AMMUNITION INDUSTRY IN THE UNITED STATES", DELIVERED BY COLONEL T. C. GERBER, FIELD DIRECTOR OF AMMUNITION PLANTS, BEFORE THE ENGINEERS' CLUB OF ST. LOUIS AND THE ST. LOUIS SECTION OF THE AMERICAN INSTITUTE OF MINING AND METALLURGICAL ENGINEERS 16 MARCH, 1944.

"In the 1940 world of uncertainty of daily crises, of mounting fears and terrors, what did we do about ammunition? The immediate problem was clear. The total production in the U. S. of smokeless powder and TNT which are basic in the manufacture of ammunition was about 100,000 pounds per day each, which is roughly the quantity sufficient to maintain an army of only 100,000 troops on the field of active combat for a single day. The existing facilities for the loading of new military ammunition consisted of two Government arsenals, one, Frankford Arsenal, for the manufacture of small arms ammunition, and the other, Picatinny Arsenal, for the loading of ammunition other than small arms. In addition to these arsenals certain depots were renovating old ammunition on a small scale. This is perhaps the appropriate place to make clear the difference between ammunition as I will speak of it tonight and small arms ammunition. Small arms ammunition consists of pistol, rifle and machine-gun cartridges which are chiefly 45, 30 and 50 caliber. As distinguished from these items, the ammunition to which I refer consists of all types having a size greater than 50 caliber. This begins with 20mm ammunition and ranges upward to the 16 in. shell and the 4,000 pound and larger bomb. It includes bombs of all kinds, rockets, land mines, grenades, and other items.

"The capacity of the Government arsenals was not a capacity intended to meet the needs of war. They had

been traditionally laboratories for the technological improvement of ammunition, rather than factories for mass production. We had only one such Arsenal for large ammunition. Further, the production that was needed was inconceivable on any basis other than that of actual newly constructed capacity, for the estimated needs were many, many times any capacity that could be hoped for from the arsenals. The program for manufacture of ammunition became primarily a program for construction of ammunition plants because there were no facilities in existence which could give the desired production, and there were none which it was practical to adapt to such production, and there were almost no outside sources from which these quantities of ammunition could be obtained. The program called for the immediate construction of plants which could make military explosives and could load shell, bombs and other items with these explosives.

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"With provisions made for the production of powder, explosives and allied chemicals, there still remained the task of actually assembling the metal parts made by thousands of private contractors, and filling these parts with the propelling and explosive charges. This necessitated the design of gigantic assembly plants, which we call loading plants, with production lines laid out to load and assemble fuzes, primers, boosters, shell, bombs, rockets, mines and many other items. Production lines at Picatinny Arsenal served as basic models, but modifications of design were necessary to adapt production to the vast scale required.

"Many of you may have visited TNT plants or loading plants. Those of you who have not, would probably be most impressed by the immense size of the area each covers, and the widely separated manner in which buildings are laid out. Both TNT and loading plants consist of lines or groups of buildings scattered over an area which in some cases is as great as 20,000 acres. None of the buildings are of great size, and most are of special construction, so that if an explosion should occur, damage to both per-



sonnel and property would be limited by distance and the lightness of the missiles. You may be interested in knowing that our plants are almost the safest places to work in the country, both as to frequency and severity of accidents. Of all the industries there is only one having a better safety record, the ladies garment industry.

"In May of 1940 the Ordnance Department was procuring materials of war at a rate of one million dollars per month. In May of 1943, we were procuring materials of war at a rate of one and a half billions per month, or 150,000 per-cent more than three years previously. In those three years, Ordnance procurement plans had expanded into a 65 billion dollar program; and the Ordnance Department was procuring materials annually, which were equal in value to one-half the total national income in 1932. Ammunition procurement has been a substantial part of the Ordnance program, involving the expenditure of approximately two billion, eight hundred million dollars in 1943.

"Prior to 1940, the Ordnance Department was a relatively small branch of an army still handicapped by many of the restrictions and curtailments of the pacifist philosophy of the 20's and 30's. Neither in numbers nor in the all-around ability required, was the existing personnel of the Ordnance Department, or of any other branch of the Government, capable alone of carrying out the tremendous industrial program which was necessary. If the skill for business administration on this gigantic scale existed anywhere, it was possessed by the leaders of industry who had successfully demonstrated their abilities as peace-time administrators and producers.

"It was to these leaders that the Ordnance Department turned for aid in the crisis that was at hand. In 1940, Major Gen. Levin H. Campbell, Jr., who is now Chief of Ordnance, was made Chief of the Facilities and Plant Administration Section, which had the mission of developing the facilities necessary to meet the ammunition program. General Campbell was, and is, a firm believer in the ability

of American Industry to meet the tremendous problems connected with preparation for war. He felt that the leaders of industry were the logical men to call upon for the practical development of our ammunition program. Accordingly, procedures for the joint management by industry and the Ordnance Department of the ammunition program were worked out and cost-plus-a-fixed-fee contracts for the operation of ammunition plants were negotiated with various large corporations.

"The names of these contractors are familiar to all of you—duPont, Hercules, Firestone Rubber, United States Rubber, Atlas Powder, Cities Service, and a host of others. People are often surprised to learn that among them are subsidiaries of the Quaker Oats Company, which has done a very good job in loading bombs, and of the Procter & Gamble Co., which has received the Army-Navy "E" for its excellence in the loading of ammunition. In addition to these great manufacturing corporations, several large construction engineering companies also went into the business of operating ammunition plants. Chemical Construction Corp., Silas Mason Co., Day & Zimmerman, Todd & Brown, Fraser-Brace, Sanderson & Porter, and Ford, Bacon & Davis are typical examples. These names alone will indicate clearly to you gentlemen the caliber of the business talent which went into the creation of the ammunition industry. In obtaining these contractors, the Ordnance Department depended more upon their patriotism than upon profit, and our experience under cost-plus-a-fixed-fee contracts has shown that profits are low both in actual amount and in relation to the nature and scope of the work performed.

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"The Ordnance Department, being a prime party to the contract, has in residence at every plant a nucleus of Ordnance Officers, with a staff of Ordnance civilians, administering these cost-plus-a-fixed-fee contracts in the interest of the Government and of the people. This staff has the dual function of seeing that the government provides its share of duties to enable the contractor to perform his mission

of producing high-quality ammunition in quantity, and of seeing that Government property and Government money are not abused or misused. In administering the contracts, the Ordnance Department had to consider the fact that vast quantities of high-quality ammunition were needed at once, and that the penalty for delay might be defeat.

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"In August, 1942, the Chief of Ordnance created a sub-office in St. Louis to exercise centralized control over the Government-owned ammunition plants which had been, or were being brought into production. These plants were to produce more than 95% of the ammunition manufactured for the War Department, as well as a substantial quantity for the Navy, and were to have their products shipped to every corner of the world for use by our own troops or as lend-lease aid by our allies. The plants were 60 in number, representing a capital investment of more than 2 billion dollars.

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"The Office of the Field Director of Ammunition Plants exercises administrative and executive control over those plants within the limits of the contracts. Officers and civilians who have literally 'grown up' with the plants and are familiar with every aspect of them assist with the technical problems and analyze the various administrative complications that develop at these enormous enterprises.

"Our office acts as a 'trouble shooter' for these plants. If the contractor is having trouble producing an item, an expert on that specific item will examine the manufacturing procedure and recommend changes which will correct the difficulty. If a special item of material or equipment is needed quickly, we expedite the request through the various Government control agencies in Washington.

"By 1943, almost all of these facilities were in production, and the problem had become one of control of production and administration, rather than construction."

## APPENDIX B

**STATEMENT OF LABOR POLICY GOVERNING  
GOVERNMENT-OWNED, PRIVATELY-  
OPERATED PLANTS.**

Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if



he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.

Recognizing these facts, and desiring to preserve the greatest freedom of organization and collective bargaining by the employees which is compatible with the necessary discharge by the War and Navy Departments of their responsibility for maximum production and the safe and efficient operation of these plants, the War Department and the Navy Department have established the following labor policies to which the American Federation of Labor and the Congress of Industrial Organizations have agreed after assisting in their preparation. It is recognized that these policies do not cover all aspects of labor relations in these plants, and experience may indicate the desirability of modifying, adding to, or otherwise amending this statement of policy.

1. No employee or person seeking employment shall be discriminated against by reason of race, color, creed, or sex.

2. The recognition of an exclusive bargaining agent for the employees in any appropriate bargaining unit within any plant will be deferred until a majority of the estimated total of that unit has been hired, unless special circumstances shall justify an earlier designation of such exclusive bargaining agent. The War and Navy Departments will undertake to estimate with reasonable promptness the total employee complement of the appropriate unit.

3. While no recognition shall be accorded any organization as the exclusive representative of any group of employees until the proper collective bargaining agency shall have been determined under the conditions described above, provision will be made for the handling of grievances and other disputes, and the elimination of friction between employees and management during the period pending such determination. These procedures should be

approved by the representative of the Army or Navy in charge of operations at the plant.

4. Seniority shall be a determining factor in matters affecting layoff and reemployment, transfers, demotions and promotions only if other factors of ability and aptitude are equal.

5. (a) Discharges directed by the War or the Navy Departments for suspicion of subversive activities will be handled in accordance with the provisions of the "Joint Memorandum on Removal of Subversives from National Defense Projects of Importance to Army or Navy Procurement", dated January 10, 1942.

(b) Discharges directed by the Army or Navy Officer in charge in the interest of plant security will be handled in the following manner: (1) the Officer, or his representative will direct the contractor to suspend the employee in question immediately; (2) the employee will be advised in detail of the specific reasons for his suspension and of his right to a hearing; (3) if requested, a hearing will be held by the Officer, or his representative, within a reasonable period and at such hearing the suspended employee will have an opportunity to produce witnesses and present evidence and to be assisted by counsel; (4) based on such hearing, the Officer, or his representative, will direct the reinstatement (with authority to grant back pay) or the discharge of such employee; (5) an employee so discharged will have the right, upon request, to have his case reviewed by the War or Navy Department.

6. No agreement between the management and its employees, or their representatives, except those which affect the safety and health of employees, may be entered into, or action taken, which, in the opinion of either the Secretary of War or the Secretary of the Navy, will have the effect of restricting or hampering maximum output.

7. (a) Anti-sabotage, anti-espionage and plant protective measures, including access into the plant, approved or prescribed by the War and Navy Departments, or their

representatives, shall be binding upon management, employees, and their representatives.

(b) Measures designed to guard against sabotage, espionage, subversive activities and other plant protective measures which are ordered or approved by the Army or Navy representatives shall insofar as practicable be prominently posted throughout the plant and otherwise made available to employees. Violations of any of these rules or regulations shall be grounds for disciplinary action, including immediate dismissal.

8. (a) The War and Navy Departments in most instances, have contractual responsibility for the approval of all costs including payroll costs. These Departments therefore will from time to time jointly agree upon the policies to govern the exercise of these contractual responsibilities to approve or disapprove proposed wage scales at these plants.

(b) Before operations commence at any plant, the contractor will prepare a wage scale to apply upon the commencement of operations and submit the same for approval to the War or Navy Department through the local Army or Navy representative at the plant, who will forward these with their own comments regarding the appropriateness of the proposed scale. Any subsequent adjustments in the initial wage scale at any plant shall be worked out by the contractor and the employees through established procedures, provided only that the approval of the War or Navy Department must be obtained before such adjustments may become effective.

9. This statement of policy shall be applicable to all such plants except that where any provision of the statement conflicts with a provision in an existing contract, such contract will not be altered except by mutual consent.

## APPENDIX C

EXCERPTS FROM VOLUME I, GENERAL HISTORY,  
OFFICE OF THE FIELD DIRECTOR OF AMMUNI-  
TION PLANTS, OFFICE OF THE CHIEF OF ORD-  
NANCE, ARMY SERVICE FORCES, DATED OCTO-  
BER, 1945.

"VII. PRODUCTION ASSISTANCE

*"Early Technical Function of FDAP*

"One of the functions which moved to St. Louis as an original part of FDAP was the Loading and Assembly section. This organization included officers and civilians familiar with ammunition loading, and with the design, construction and operation of loading lines. The early activities of this section were concerned with following the progress of construction, assisting in the initial equipment and operation of completed production lines, and aiding in the development of practices and procedures for improved loading methods.

*"Scheduling Responsibilities*

"Very soon after the office was established further functions connected with ammunition loading were transferred to St. Louis. One of these was the scheduling of production at specific plants. Under the established procurement procedure, overall requirements for the various types of ammunition are sent to the Field Director's office, and there broken down among the different plants. In deciding the quantities which would be scheduled for any single plant many factors had to be weighed, of which a few were the type of equipment at the plant, the availability of components, the state of the labor supply, the comparative efficiency of the plant, and a wide number of other points. When the schedules were such that new equipment or different tooling was required, the placement of



schedules had to be coordinated with the recommendations of technical experts who decided on the best location and methods for the desired changes.

### *"Regulating Functions"*

"FDAP has also performed the important task of regulating the flow of materials to the plants. Loading plants are primarily a series of assembly lines whose efficiency of operation is dependent entirely upon the coordinated arrival of all components and sub-assemblies at the right moment in each assembly line. It was complicated further by reason of the presence of explosives which limited in each sub-unit of the line the number of loaded sub-assemblies, the bulk explosives of the finished product. Thus there could be no stoppage within the line and the flow to the line had to be continuous and even. Metal parts were procured through the Ordnance Procurement Districts, while explosives were manufactured under the control of FDAP. In addition, loaded sub-assemblies had to be scheduled and regulated to the various final assembly lines by FDAP. Although metal parts were regulated, through necessity by the main office Ammunition Division in Washington, the flow of loaded sub-assemblies, the production schedules of explosive plants and the regulating of these explosives were coordinated completely by FDAP.

### *"Following Production Progress"*

"It was also the responsibility of technical experts in FDAP to follow the production progress of the plants. Reports on the quantities of ammunition loaded were received and studied, as well as reports on quality of the output, as shown by proving ground tests. When schedules were not being met, or when quality was shown to be poor on the basis of proving ground tests, the technical experts familiar with the particular item went to the plants and assisted in correcting the trouble.

### *"Preparation of Standard Procedures*

"An important contribution of FDAP to ammunition manufacturing has been the preparation by leading experts of standard procedures for loading the various types of ammunition. These procedures, worked out after much experience and observation, furnished a standard pattern for any contractor embarking upon production of an item he had not turned out before, and aided contractors who were already producing to make improvements in their methods.

"The technical experts of FDAP kept themselves readily available for trouble-shooting activities, and very frequently visited the plants to assist with problems. This method of direct contact also led to interchange of useful information among contractors.

### *"Storage and Warehousing*

"Safety considerations, danger of deterioration, and the aim of low handling costs make the storage of finished ammunition and ammunition components a major problem of the War Department. Extensive facilities were provided at each new plant. They became to some extent small field depots, and in consequence proposed the same problems as a depot. There were no typical storage drawings for many of the new rounds loaded at the plants. These were developed in conjunction with certain selected plants. These typical were based on palletized loads wherever practicable to give greater speed of handling and maximum utilization of personnel. Space control was instituted by FDAP, so it was able to balance the storage load among all plants and works. Through periodic reports and direct contact, personnel qualified in storage and warehousing activities were able to keep the overall storage picture in proper focus, avoiding under-utilization of space at one plant and over-loading at others. Through cooperation with Field Service, Ordnance Department, untold millions of dollars and precious manpower were saved by shipping direct from the end of the assembly lines to ports of embarkation."



# **In the Supreme Court of the United States**

**OCTOBER TERM, 1947**

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**No. 590**

**HARRIS KENNEDY, ET AL., PETITIONERS**

**v.**

**SILAS MASON Co.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT.**

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## **MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE**

The United States respectfully requests that the Court grant the petition for certiorari in the above case.

This case involves the liability of Government cost-plus contractors under the Fair Labor Standards Act. During the war the Government built a large number of war plants which it continued to own, but which were operated by independent contractors like the respondent herein. Pursuant to instructions from the War Department, the contractors paid the vast majority of their employees time and one-half for all hours worked over forty per week. We are advised by the Department of the Army that this was done



as a matter of labor policy, without regard for whether the Fair Labor Standards Act was applicable. Since the termination of the war, a great many of the employees who were not paid time and one-half for hours over forty have brought suits such as this case for violations of Section 7 of the Act. The plaintiffs in these suits are, in the main, employees as to whom there is doubt as to the applicability of the Fair Labor Standards Act, such as persons whose work may be regarded as in a professional or executive capacity, and thereby exempt under Section 13 (a) (1), and firemen as to whom there has been a dispute as to what hours are to be counted as hours worked (e. g., *Bell v. Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813).

Approximately 250 suits have been brought against Government cost-plus-contractors by such employees. The aggregate of the sums which may eventually be involved in these claims, according to information received from the Department of the Army, runs to several hundred millions of dollars. If the decision below in the instant case is correct, all of these suits will fail. If the decision is incorrect, the defendants will present other defenses which will have to be determined by the courts in a large number of long trials involving the status of thousands of individual employees.

In a number of these cases private counsel for the contractors have raised the questions of general coverage determined by the court below. The Department of the Army is of the view that these defenses have merit, but the Wage and Hour Administrator of the Department of Labor has filed briefs as *amicus curiae* in the lower courts in many of the cases in which he takes a contrary position on the question of coverage.

In a number of cases the National Labor Relations Board has also taken the position, contrary to that of the court below, that interstate commerce includes the interstate transportation of property of the United States to be used for military purposes.<sup>1</sup> One of its decisions on the ques-

<sup>1</sup> *Westinghouse Electric & Mfg. Co.*, 38 N. L. R. B. 404, 412; *Day & Zimmerman, Inc.*, 39 N. L. R. B. 1313, 1314, and 41 N. L. R. B. 24, 25; *American Hawaiian S. S. Co.*, 41 N. L. R. B. 425; *United States Cartridge Co.*, 42 N. L. R. B. 191, 192; *Lukas-Harold Corp.*, 44 N. L. R. B. 730, 731-732; *Copolymer Corp.*, 52 N. L. R. B. 578, 579; *Brown Shipbuilding Co.*, 57 N. L. R. B. 326, 328; *War Hemp Industries, Inc.*, 57 N. L. R. B. 1700, 1710; *Brown Shipbuilding Co.*, 58 N. L. R. B. 998, 999-1000; *Brown Shipbuilding Co., Inc.*, 60 N. L. R. B. 196; *Atlas Fence Co.*, 61 N. L. R. B. 984, 985; *Carl L. Norden, Inc.*, 62 N. L. R. B. 828, 836-837; *Lone Star Defense Corp.*, 63 N. L. R. B. 579, 580; *Odenbach Shipbuilding Corp.*, 64 N. L. R. B. 1026, 1034; 47 N. L. R. B. 1261, 1262; *The B. F. Goodrich Co.*, 65 N. L. R. B. 1229, 1232; *Brown Shipbuilding Co.*, 66 N. L. R. B. 1047, 1054-1055; *The Ingalls Shipbuilding Corp.*, 67 N. L. R. B. 1194, 1195-1196; *Waterfront Employers Ass'n of the Pacific Coast*, 71 N. L. R. B. 80, 87; *Carbide and Carbon Chemical Corp.*, 73 N. L. R. B. 134, 135; *Reynolds Corp.*, 74 N. L. R. B. No. 248.

tion is now awaiting review in the Fifth Circuit.<sup>2</sup> This issue is one of constitutional interpretation as well as of statutory construction, and its importance transcends the Fair Labor Standards Act.

All of the governmental agencies concerned are agreed that the questions presented in this case should be settled finally by this Court, and that an early disposition of the matter is highly desirable.

There is in addition a conflict in the lower courts upon the question of whether the Fair Labor Standards Act applies to the employees in Government-owned munitions plants operated by cost-plus contractors. The Circuit Court of Appeals for the Seventh Circuit (*Bell v. Porter, supra*) and the Supreme Court of Iowa (*Umthun v. Day & Zimmerman, Inc.*, 235 Iowa 293) have reached a conclusion different from that of the court below. Cf. *Divins v. Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. C. A. 2). Most District Court decisions are to the same effect, but there are a number of decisions to the contrary.<sup>3</sup>

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<sup>2</sup> *Labor Board v. Reynolds Corporation*, No. 11492 (C. C. A. 5).

<sup>3</sup> Employees of contractors covered: *Bailey v. Porter*, 6 W. H. Cases 1017 (N. D. Ill., 1947); *O'Riordan v. Helmets, Inc.*, 6 W. H. Cases 961 (N. Y. C. Ct. 1947; *Ware v. Good-year Corp.*, 6 W. H. Cases 160 (S. D. Ind., 1946); *Sweetman v. Remington Rand*, 6 W. H. Cases 336 (S. D. Ill., 1946); *Moehl v. du Pont de Nemours & Co.*, 6 W. H. Cases 638 (N. D. Ill., 1947); *Blazier v. Western Pipe & Steel Co.*, 6 W. H. Cases 636 (S. D. Cal., 1946); *Tiller v. Anchor Optical*

In view of the importance of the questions and the conflict, it seems sufficient at this time to state that on the merits of the case there is grave doubt as to the correctness of the decision below with respect to each of the issues decided.

For the above reasons we urge that the petition for certiorari be granted. In view of the

*Corp.*, 6 W. H. Cases 655 (S. D. N. Y., 1947); *Roland v. United Airlines*, 6 W. H. Cases 663 (N. D. Ill., 1947); *Bolanger v. Hopeman Bros.*, 6 W. H. Cases 616 (D. Maine, 1947); *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa); *Lasater v. Hercules Powder Co.*, 7 W. H. Cases 150 (E. D. 10, 1947); *McCumisky v. Norden, Inc.*, 7 W. H. Cases 142 (N. Y. S. Ct. 1947); *Sigkins v. Elmhurst Contracting Co.*, 181 Misc. 791, affirmed, 181 Misc. 793, affirmed, 268 App. Div. 858; *Steiner v. Pleasantville Constructors*, 181 Misc. 798, affirmed (modified on other grounds), 182 Misc. 66, affirmed 269 App. Div. 738; *Henderson v. Bechtel-McCormick Corp.*, 7 W. H. Cases 107 (N. D. Ala., 1947); *Jackson v. Northwest Airlines*, 7 W. H. Cases 368 (D. Minn., 1947); *Jackson v. Northwest Airlines*, 7 W. H. Cases 702 (D. Minn., 1948); *U. S. Cartridge v. Powell*, no opinion (E. D. Mo., 1947); *Bumpus v. Remington Arms Co.*, 7 W. H. Cases 501 (W. D. Mo.).

Contra: *Barksdale v. Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark.); *Deal & Co. v. Leonard*, 196 S. W. (2d) 991 (S. Ct. Ark.); *Matlock v. Sanderson & Porter*, 6 Wage Hour Rept. 917 (C. C. Ark., Jeff. Co., 1943); *Kruger v. Los Angeles S. & D. Corp.*, 6 W. H. Cases 831 (S. D. Calif.); *Stewart v. Kaiser Co.*, 71 F. Supp. 551 (D. Oregon); *Anderson v. Federal Cartridge Corp.*, 7 W. H. Cases 1 (D. Minn. 1947); *Macklin v. Kaiser Co., Inc.*, 69 F. Supp. 187 (D. Oreg.); *Young v. Kellew Corp.*, 14 Lab. Cas. par. 64, 244 (E. D. Tenn., 1948); *Lynch v. Embury Riddle Co.*, 63 F. Supp. 992 (S. D. Fla.); *Hays v. Hercules Powder Co.*, 7 W. H. Cases 381 (W. D. Mo., 1947); *Trefts v. Foley Bros.*, 7 Lab. Cas. par. 61, 743 (W. D. Mo.); *Torres v. Lock Joint Pipe Co.*, 1 Prentice-Hall W & H Serv., par. 10189.8 (D. Puerto Rico).



number of similar cases presently in the course of litigation, we also request the Court to set the case for argument this term.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*

MARCH, 1948.

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1947**

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**No. 590**

**HARRIS KENNEDY, ET AL., PETITIONERS**

**v.**

**SILAS MASON COMPANY**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

---

## **OPINIONS BELOW**

The opinions of the district court (R. 220-235; 238-239) are reported at 68 F. Supp. 576 and 70 F. Supp. 929. The majority, concurring, and dissenting opinions of the Circuit Court of Appeals (R. 249-256) are reported at 164 F. 2d 1016.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on December 12, 1947 (R. 256). The petition for certiorari was filed February 13, 1948, and was granted on March 8, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

# QUESTIONS PRESENTED

1. Whether persons employed pursuant to a cost-plus-fixed-fee contract between a private company and the United States to produce munitions for use in the prosecution of war are employees of the Government or of the private contractor?

2. Whether the munitions produced under such circumstances and shipped across State lines for use in the war are produced for "commerce" within the meaning of the Fair Labor Standards Act?

3. Whether the munitions produced under such circumstances are "goods" within the meaning of Section 3 (i) of the Act?

## STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, are as follows:

SEC. 3. As used in this Act—

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, \* \* \*

(e) "Employee" includes any individual employed by an employer.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

The pertinent provisions of the Act of July 2, 1940, c. 508, 54 Stat. 712, are as follows:

SEC. 1 (a). \* \* \* the Secretary of War is authorized \* \* \* (2) to provide for the \* \* \* manufacture \* \* \* of military equipment, munitions, and supplies \* \* \* *Provided* \* \* \* That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: \* \* \*

SEC. 1 (b). The Secretary of War is further authorized, with or without advertising, to provide for the operation and main-



tenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, . . .

Sec. 4 (b). Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics.

#### STATEMENT

This action was brought pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 to recover unpaid overtime compensation and liquidated damages allegedly due petitioners for violations of the Act (R. 1-8).<sup>1</sup> Respondent,

<sup>1</sup> The complaint also alleged a cause of action under the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. 35), but as no question as to the applicability of that Act was raised in the petition for cer-

relying upon the affidavit of its Vice-President (R. 20-22) and its contract with the War Department pursuant to which petitioners were employed (R. 22-218), moved for summary judgment (R. 19-20), which was granted by the district court (R. 240). The Circuit Court of Appeals, sitting *en banc*, affirmed the judgment, Judge Sibley concurring in a separate opinion and Judge Hutcheson dissenting (R. 249-256).

Respondent entered into a contract with the War Department to construct and operate a plant for the loading of shells, ammunition, bombs, and other products and materials at Minden, Louisiana, pursuant to a cost-plus-a-fixed-fee contract between respondent and the United States (R. 2-3, 20-21). Under the contract respondent was required to prepare the completed munitions for shipment out of the State for use in the conduct of war, and to load them on carriers in accordance with the Government's shipping instructions (R. 45-46). The plant and equipment used in the production activities, as well as the goods worked on, were the property of the United States (R. 21).

tiorari, no issue as to its applicability is before the Court. *Helis v. Ward*, 308 U. S. 365, 370. While the coverage of the Fair Labor Standards Act and the Walsh-Healey Act may overlap, there is nothing inconsistent in the application of both statutes, where both are applicable by their terms. See Fair Labor Standards Act, Section 18, 29 U. S. C. 218. Cf. *Walling v. Patton-Tulley Transp. Co.*, 134 F. 2d 945, 948 (C. C. A. 6).

The contract, pursuant to which respondent constructed and operated the plant, referred to respondent as the "contractor", and provided that the contractor was "the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract" (R. 48). The contract also stated that the employees "shall be subject to the control and constitute employees of the Contractor" (R. 45, 113). The contractor employed the workers, and of course hired, fired and paid them (R. 45, 226). The contract permitted the Contracting Officer to require the dismissal of any employee deemed incompetent "or whose retention is deemed to be not in the public interest" (R. 76). The contractor was to receive specified fees under the contract, in addition to reimbursement for costs (R. 21), but the contract provided for renegotiation of these fees "to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits" (R. 128). If the contractor failed promptly to pay bills and payrolls incurred under the contract, the Government was authorized to pay such bills or payrolls as were not disputed in good faith by the contractor, and to deduct five percent of the amount so paid from the contractor's fee (R. 63.). Costs which were not reimbursable under the contract included salaries of the contractor's executive officers, expenses incurred in conducting the contractor's main office

or regularly established branch offices, any interest on capital employed or money borrowed (R. 60, 119), and wages in excess of those approved by the Government (R. 36-37). The contract also provided that "in case the full time of any employee of the Contractor at the Plant is not applied to the work," his salary shall be considered a reimbursable cost "in proportion to the actual time applied thereto" (R. 53, 55-56).

The contract contemplated compliance by the contractor with various Federal and State regulatory statutes applicable to private employers. Specific provision was made for compliance in appropriate situations with the Eight-Hour Law (R. 38-39, 41, 43), the Walsh-Healey Act (R. 47-50, 116), and other statutes regulating the wages to be paid by employers engaged in work under contracts with the Government (R. 35-38). Compliance with the Social Security Act was also contemplated by the inclusion of the employer's contribution as a reimbursable cost under the contract (R. 54). The contractor was required to provide for all its employees "Workmen's Compensation Insurance or such other protection for employees as may be required by Federal or State statutes in the jurisdiction in which such work is performed \* \* \*" (R. 78). It also agreed to "Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and



other rules of the United States of America, of the state, territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority" (R. 75).

The contractor was required to operate the plant "as directed from time to time by the Contracting Officer" (R. 44). When the Contracting Officer deemed the Contractor's personnel or overhead to be excessive, he could order reductions, and if he was of the opinion that the Contractor had fallen behind the progress schedule he could order an increase in the number of working days per week or hours of labor per day (R. 34).

The court below, affirming the judgment of the district court, held that petitioners were not within the scope of the Act on the grounds (1) that they "were working directly under the supervision and control of the Government" and were therefore precluded from recovery as employees of the United States, and (2) that the munitions "never at any time went into or became a part of commerce as defined by the Fair Labor Standards Act" (R. 250, 251). As an alternative ground of decision, the court held (3) that if respondent was not an agency or instrumentality of the United States, and if the munitions were produced "for commerce," and if the United States was not the producer or the employer, then the Act was inapplicable because the munitions

were not "goods" under Section 3 (i) of the Act (R. 252-253):

#### SUMMARY OF ARGUMENT

##### I

The employees of the contractor were not exempt from the Fair Labor Standards Act as employees of the United States. It is well established that persons who work for those who contract with the Government are not the Government's employees, even though the economic burden falls on the Government through a cost-plus arrangement, and even though the Government may have a supervisory control over the performance of the contract. Here the contract expressly provided that the employees "shall be subject to the control and constitute employees of the Contractor." This provision accurately described the manner in which the contract was performed. The contract also subjected the contractor to many statutes inapplicable to Government employees. The effect of the decision below

\* Judge Sibley concurred, stating that he "would prefer to pass over the question" whether petitioners were the employees of respondent or of the Government, and hold only that the munitions were produced for war and not for commerce (R. 253-254). Judge Hutcheson dissented, stating that "here the whole elaborate system was designed and operated so that the United States should not be the employer," and that the munitions, since they were "produced for transportation from a state to a place outside thereof," were goods produced for commerce within the coverage of the Act (R. 255).

is to hold employees of such contractors to be Government employees for purposes of the Fair Labor Standards Act but not with reference to anything else.

Section 4 (b) of the Act of July 2, 1940, which the court below held to supersede the Fair Labor Standards Act, applies only to persons "employed by the War Department," not to persons who are not Government employees. If petitioners are not the employees of the Government, the statute has no application.

## II

Munitions intended to be carried across state lines by the Government for war purposes are produced for interstate commerce. The Fair Labor Standards Act defines interstate commerce in constitutional terms, and it is established by many decisions of this Court that such commerce is not limited to interstate transactions for commercial purposes in the strict sense. Nothing in the language or purpose of the Act supports a restrictive interpretation. The Department of Justice, the Wage and Hour Administrator, the National Labor Relations Board, the Comptroller General, and even the War Department in 1942, have all been of the view that the shipment of Government owned munitions across state lines constitutes interstate commerce under the national labor legislation. Furthermore, in enacting the Portal-to-Portal Act, Congress predicated

its findings on the assumption that the employees of cost-plus contractors were subject to the Fair Labor Standards Act.

### III

Section 3 (i) of the Fair Labor Standards Act, which excepts from the definition of goods "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor", does not apply to respondents' manufacturing operations which occurred before the goods were delivered into the possession of the United States as ultimate consumer. Inasmuch as the exemption excludes the productive operations of the ultimate consumer, the result of the construction adopted by the court below is to subject to the Act the manufacturing operations of an ultimate consumer but to exempt the same operations if carried on by an independent manufacturer who sells to the ultimate consumer within the state but for interstate shipment. The decision below also means that if an ultimate consumer takes delivery within the state the producers' operations are exempt, but if he takes delivery after interstate transportation the producers' operations are covered. The language, purpose, and history of Section 3 (i) show that it was not intended to have any such capricious results, which would seriously impair the general coverage of the Act, but was designed to protect the



consumer from liability for transporting goods produced under substandard conditions. The consistent administrative interpretation, supported by the Department of Justice, has limited the exemption to the consumers, as Congress intended, and not extended it to producers of goods for commerce. The circuit courts of appeals (except for the Fifth Circuit in some of its decisions) have come to the same conclusion.

#### ARGUMENT

#### INTRODUCTION

The respondent is a Government cost-plus contractor who has been represented in this case by private counsel. The Administrator of the Wage and Hour Division of the Department of Labor appeared as *amicus curiae* in the court below in opposition to respondent's contentions on the questions of coverage. The court below accepted respondent's contentions. We are of the opinion that that decision is unsound.

The Department of the Army is of the view that respondent's position has merit for the reasons set forth in the brief filed by respondent. The Army is concerned with the great cost to which the Government will be subjected if the numerous suits akin to this are lost, or even if it must bear the cost of defending them. Furthermore, the Army believes that the classes of employees involved in these cases were well paid, that they accepted their compensation without complaint or expectation of

receiving more until this litigation was commenced sometime after the termination of their employment, and that accordingly there is little equity in the employees' present position. Although we are aware of the difficulty in defending these <sup>C.U.T.</sup> suits, as a result of the dispersal of the documents and personnel necessary to the defense, and of the heavy costs involved, we cannot regard these factors as controlling in the interpretation of an important regulatory statute which it is the duty of the Government to enforce. The Department of Justice and the Wage and Hour Administrator have consistently regarded these cost-plus contractors as subject to the Fair Labor Standards Act. See n. 11, pp. 26-27, *infra*. And it is to be noted that in 1942 the Secretary of War was apparently of the same opinion.\*

\* On August 25, 1942 the Secretary of War wrote to the Comptroller General in part as follows (29 Comp. Gen. Dec. 277, 278):

"It seems to be generally conceded by the Ordnance Department, in its Manual of Instructions for the Administration of Contracts, Section XI-G-1, 2, and 3, and Section XI-I-4, that the Act is applicable. (However, the expression was in September, 1941, and after the fact upon which part of the claim arose in the instant case.) This same view is expressed by the Office of the Under Secretary of War as may be seen from the following excerpt from a memorandum dated September 30, 1941, Director of Purchases & Contracts, to The Quartermaster General:

"\* \* \* Furthermore, it is the expressed policy of the War Department, that all its contractors should comply with the statement of labor policy adopted by the Ad-

This brief is concerned only with the question whether the Fair Labor Standards Act may apply to the employees of Government cost-plus contractors producing munitions for delivery to the Government for use in war. We take no position as to whether the particular petitioners in this case have any valid claim in other respects.

visory Commission on August 21, 1940. This statement of policy provides in part as follows:

"All work carried on as part of the defense program should comply with federal statutory provisions affecting labor wherever such provisions are applicable. This applies to the Walsh-Healey Act, Fair Labor Standards Act, the National Labor Relations Act, etc."

"It is the opinion of this office that this policy was intended to apply to employees of cost-plus-a-fixed-fee contractors whenever applicable to employees of similar lump sum contractors."

"The General Accounting Office, through the Assistant Chief, Audit Division, expressed a view as to the applicability of the Fair Labor Standards Act in a letter, dated June 30, 1942, sent through the Chief of Ordnance to the Commanding Officer, Wolf Creek Ordnance Plant. The letter stated that the Fair Labor Standards Act was applicable to custodial and administrative employees of Procter & Gamble, operators of the Ordnance Plant at Milan, Tennessee under a cost-plus-a-fixed-fee contract, W-ORD-494. While not so stated in the letter, the logical implication appears to be that other contractors operating under similar contracts are also covered by the Act."

"The Ordnance Department is aware, of course, of the fact that the United States is not an employer as that term is defined in Section 8 (d) of the Fair Labor Standards Act, and is, therefore, specifically excluded from its requirements. See also 20 Comp. Gen. 24. This exclusion would not, however, cover Ordnance cost-plus-a-fixed-fee contractors as operating employers since such Ordnance Contractors have been designated in Title VIII, Article

In the event that the decision below is reversed, this will not establish the liability of the Government or the contractor, since the various other defenses such as particular exemptions, defenses under the Portal-to-Portal Act, failure of proof, statute of limitations, etc., are still available. A remand for trial on these issues will be necessary if the decision below is reversed on the question of coverage.

## I

**PETITIONERS WERE EMPLOYEES OF RESPONDENT,  
NOT OF THE UNITED STATES**

The holding of the court below that respondent was an agent or instrumentality of the United States, and hence excluded from the scope of the Act under Section 3 (d),<sup>\*</sup> is contrary to the controlling decisions of this Court under other statutes as well as to the decisions of the other circuit courts of appeals which have passed on

VIII-A-6 of the instant contract, and generally in other Ordnance contracts, to be independent contractors. The Supreme Court, in the case of *Alabama v. King and Boozer, et al*, decided November 10, 1941, 314 U. S. —, and the Comptroller General in his decisions B-19726, B-19052, 21 Comp. Gen. 692, and B-23012, dated February 9, 1942, expressed the same opinion. As independent contractors, they would be employers, as that term is defined in the Fair Labor Standards Act, and, if engaged in interstate commerce, as they appear to be, then their employees are entitled to the overtime provided for in the Act."

<sup>\*</sup>Section 3 (d) provides that the term "employer" "shall not include the United States."



this issue under the Fair Labor Standards Act. The ruling is also contrary to the express terms of the contract between respondent and the United States and to the previously expressed view of the Secretary of War.\*

It is settled under this Court's decisions that service performed by a private corporation "under a contract with the United States does not make it an instrumentality of the latter," even though the service is performed on Government-owned property and under "supervisory" control by the Government. See *Buckstaff Co. v. McKinley*, 308 U. S. 359, 360, 362-363 (holding the exemption in the Social Security Act for services performed "in the employ of the United States Government or of an instrumentality of the United States" inapplicable to employees of an Arkansas corporation organized for profit whose only business was the operation of a bath house on the United States Government Reservation known as Hot Springs National Park). "That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality." *Id.*, at 363. More recently, in *United States v. Silk*, 331 U. S. 704, 712, the Court stated that "Obviously the private contractor who undertakes to build at a fixed

\* See note 3, *supra*.

price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees." See also *Alabama v. King & Boozer*, 314 U. S. 1; *Curry v. United States*, 314 U. S. 14; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149; and *Metcalf & Eddy v. Mitchell*, 269 U. S. 514. Applying these decisions to cases under the Fair Labor Standards Act, the circuit courts of appeals have hitherto consistently ruled that Section 3 (d) of the Act did not exclude employees of contractors with the Government. *Walling v. Patton-Talley Transp. Co.*, 134 F. 2d 945, 949 (C. C. A. 6); *Walling v. McCrady Construction Co.*, 156 F. 2d 932, 934 (C. C. A. 3); *Kelly v. Ford, Bacon & Davis*, 162 F. 2d 555, 557, n. 4 (C. C. A. 3); see also *Bell v. Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813; *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C. C. A. 9); *Divins v. Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. C. A. 2). Cf. *National Labor Relations Board v. Carroll*, 120 F. 2d 457 (C. C. A. 1).

The contract in this case explicitly provides that the employees "shall be subject to the control and constitute employees of the Contractor" (R. 45, 113). Although such a contractual provision in and of itself is not necessarily controlling (*Rutherford Food Corp. v. McComb*, 331 U. S. 722; *Bartels v. Birmingham*, 332 U. S. 126), here the record evidence descriptive of the relationship between the parties consists almost exclu-

sively of the contract and its supplements, which are nowhere controverted (R. 22-218).<sup>\*</sup> Under the contract (R. 45) and in fact (R. 226) the contractor hired, fired and paid the employees, and they were subject to the contractor's control. The contract recognized that employees of the contractor might be engaged both in work under the Government contract and in other work for the contractor not related to the Government contract (R. 53, 55-56). If the contractor failed to meet his payroll promptly the Government was authorized under the contract to meet the payroll and to deduct a penalty from the contractor's fee (R. 63). In addition, the contract provided for the applicability of the Walsh-Healey Act (R. 47), the Eight Hour Law of June 19, 1912 (40 U. S. C. 324) (R. 38), State workmen's compensation insurance laws (R. 78), and the Social Security Act (R. 54), none of which are applica-

<sup>\*</sup> The only other evidence consists of an affidavit by respondent's manager (R. 20-22) and affidavits of three employees, quoted in the opinion of the District Court (R. 225-227). These affidavits do not suggest that the work was not performed in the manner prescribed in the contract or that the contract's provision as to the employment relationship was not in accord with "reality." Cf. *Bartels v. Birmingham*, 332 U. S. at 131.

<sup>\*</sup> The Contracting Officer's right to require the Contractor to dismiss employees deemed incompetent or whose retention was not deemed in the public interest (R. 76) does not make the Government the employer, as *National Labor Relations Board v. Atkins & Co.*, 331 U. S. 398, 407, which involved much stronger provisions for governmental control, attests.

ble to Government employees. Furthermore, the contract prescribed fines and penalties payable to the Government for violations of the Eight Hour Law (R. 39) and Walsh-Healey Act (R. 49), provisions inconsistent with the theory that respondent was the Government's agent and not a private contractor. *United States v. Driscoll*, 96 U. S. 421, 423-424. Other stipulations in the contract inconsistent with such a theory were the provision (R. 128, 129) that excessive profits to respondent may be scaled down (the Government pays no profits to its agencies), the provision that wage costs higher than those authorized by the Government would be borne by the respondent (R. 36-37), and the representation by respondent that it was "a manufacturer" or "a regular dealer" (R. 48).

All of these provisions indicate that the explicit pronouncement in the contract that the persons employed shall "constitute employees of the Contractor" (R. 45) was an accurate description of the employment relationship. Inasmuch as these provisions of the contract have been given effect, the result of the decision below is to hold the persons hired by respondent to be employees of the Government rather than of the contractors only for purposes of the Fair Labor Standards Act, and not with reference to anything else.

Although *Alabama v. King and Boozer*, 314 U. S. 1, dealt with a different problem, it involved a contract quite similar to that before the Court



in this case. See Transcript of Record, 1941 Term, No. 602, pp. 47-68. The contractor here would seem to be the purchaser of the labor supply just as the contractor there was the purchaser of the raw material, despite the close governmental supervision over the operations of the contractor in each instance. See 314 U. S. at 13. In each case there was a cost-plus arrangement which imposed the ultimate "economic burden" (*id.* at 12) upon the Government. But it would not seem in this case any more than in that one that these factors "gave to the contractors the status of agents of the Government". *Id.* at 13.

It may be suggested that *United States v. United Mine Workers*, 330 U. S. 258, indicates that the petitioners here were government employees. The issue in that case was entirely different, however, since it involved government operation of the mines in substitution for the private employers and in accordance with the terms of a labor agreement between the Government itself and the union. See 330 U. S. at 284-288.

*The Act of July 2, 1940.* In holding that petitioners were employees of the United States, the court below attached some weight to the fact that the contract was authorized under the Act of July 2, 1940, 54 Stat. 712 (R. 24), Section 4 (b) of which provides:

Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics *employed by the War Department*, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics. [Italics supplied.]

This provision on its face applies only to persons employed by the War Department". If, as has been argued, petitioners are not employees of the War Department but of the respondent, the Act can have no application.

The court below apparently assumed that all persons employed under contracts authorized by the Act were "employed by the War Department" within the meaning of Section 4 (b). The Act in question, however, specifically authorized the operation of munitions plants "either by means of Government personnel or through the agency of selected qualified commercial manufacturers un-

der contracts entered into with them \* \* \*." Section 1 (b), *supra*, pp. 3-4, [Italics supplied.] Section 4 (b) of the Act refers to overtime for employees "employed by the War Department," i. e., "Government personnel." Sections 1 (a) and 5 of the Act provide that contracts entered into pursuant to its provisions may be subject to the Walsh-Healey Public Contracts Act, providing for minimum wages and overtime for employees of contractors with the Government (i. e., "selected qualified commercial manufacturers"). These provisions are plainly concerned with the employees of private contractors. Section 4 (b) provided overtime for Government employees to whom the Walsh-Healey provisions could not apply. The reference to "notwithstanding the provisions of any other law" in Section 4 (b), emphasized by the court below, seems clearly to relate to the laws which at that time prohibited overtime for Government employees,\* and not to the Walsh-Healey or Fair Labor Standards Act which at no time applied to employees of the War Department. Thus the Act of July 2, 1940 supports petitioners here, and not the view of the court below.

\* Section 5 of the Act of March 3, 1893, 27 Stat. 715, as amended, 30 Stat. 316, 5 U. S. C. 29; see also Act of March 3, 1931, 46 Stat. 1482, 5 U. S. C. 26a, relating to Saturday work. Subsequent to the Act here in question, Congress provided for overtime compensation for Government employees, J. Res. of December 22, 1942, c. 798, 56 Stat. 1068.

THE MUNITIONS WERE PRODUCED FOR "COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

"Commerce" is defined in the Fair Labor Standards Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Section 3 (b). This definition on its face is as broad as the constitutional phrase. Since the munitions in this case were produced for "transportation" from the State of Louisiana to a "place outside thereof," they were produced for "commerce" within the literal terms of the statutory definition. In reaching a contrary conclusion the court below reasoned that the munitions "were not manufactured for sale, nor were they ever intended or used for commercial purposes" (R. 250). But this Court, in numerous decisions has established that the movement of goods or persons across State lines is "commerce" even though no commercial transaction or purpose is involved. *United States v. Simpson*, 252 U. S. 465; *United States v. Hill*, 248 U. S. 420, 423-424; *Edwards v. California*, 314 U. S. 160, 172; *Thornton v. United States*, 271 U. S. 414, 425; *Caminetti v. United States*, 242 U. S. 470; *Goöch v. United States*, 297 U. S. 124; *Brooks v. United States*, 267 U. S. 432. See



also *United States v. Darby*, 312 U. S. 100, 113, where the Fair Labor Standards Act was upheld as a regulation of commerce on the authority of several of the above "non-commercial" cases.

It has thus long been settled that "commerce" as used in the Constitution includes "the transportation of persons and property no less than the purchase, sale and exchange of commodities," (*United States v. Hill*, 248 U. S. 420 at 423), and that "It is immaterial whether or not the transportation is commercial in character" (*Edwards v. California*, *supra*, at 172). There can be no question, therefore that interstate commerce includes the interstate transportation of Government owned goods irrespective of whether such transportation be commercial in the strict business sense.

The issue here is whether Congress intended to exclude the transportation of Government owned goods, which literally come within the statutory definition, from the "commerce" regulated by the Fair Labor Standards Act—a question which, in view of the exemption for the Government as an employer, arises only with respect to the employees of private employers producing material for the Government. Clearly no such limitation appears in the broad statutory definition, which includes the language of the Constitution. Nor is there anything in the legislative history of the

Act which indicates a Congressional intent to narrow the definition so as to except the transportation of Government-owned goods. On the contrary this Court has recognized that it was clearly the purpose of the Act to extend its control "throughout the farthest reaches of the channels of interstate commerce". *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 567. "Nowhere in the Act is it suggested that Congress intended that transportation effected by the Government or of Government goods be treated differently from all other transportation." *Bell v. Porter*, 159 F. 2d 117, 119 (C. C. A. 7), certiorari denied, 330 U. S. 813."

There would thus appear to be no valid reason or authority for confining the scope of this Act to transportation for "commercial" purposes. Accordingly, throughout the course of the war, all of the Government agencies concerned proceeded on the assumption that production of munitions and other goods to be shipped across State lines for use by the Government in the prosecu-

\*Citing the following statement by Senator Borah:  
 " \* \* \* if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec., 75th Cong., 3d Sess., Part 8, p. 9170.

<sup>10</sup> See also *Clyde v. Broderick*, 144 F. 2d 348, 351 (C. C. A. 10).

tion of the war, was for "commerce" within the scope of the Federal statutes regulating labor standards and relations." The Administrator of

"During the war much of the equipment, munitions and other materials needed for the prosecution of the war was produced under contracts like the one between the Government and respondent herein. The vast majority of the employees of such contractors were paid in accordance with the statutory standards. This was done pursuant to instructions from the Government contracting agency, in accordance with the mutual understanding of the various Government departments concerned that the Fair Labor Standards Act was applicable to employees of such cost-plus contractors. See opinion of the Comptroller General dated September 28, 1942, 22 Comp. Gen. Decisions 277 (n. 3, pp. 13-15, *supra*), quoting a letter from the War Department indicating its belief at that time that the Fair Labor Standards Act was applicable. The employees involved in this and similar suits are in the main employees who were thought to be within some exempting provision of the Act or as to whom there has been some dispute regarding hours of work. For example, petitioners here were foremen or safety inspectors, who were believed to be employed in an "executive" capacity within the exemption provided by Section 13 (a) (1), a defense still to be litigated in the event, the decision below is reversed. Employees involved in other cases have been firemen as to whom there has been a dispute as to what hours are to be counted as hours worked (e. g. *Bell v. Porter*, 159 F.2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813). Except for employees as to whom there was some such particular defense, the employees of cost-plus contractors were considered subject to the Act and were compensated accordingly throughout the years of the operation of these contracts.

In establishing the policy for defending suits by individual employees, the Department of Justice instructed the U. S. Attorneys not to assert, in the cases in which they represented the contractors, the defenses that cost-plus contractors were not engaged in commerce or in the production of goods for commerce or that their employees were exempt as Government employees, since it was the Department's opinion

the Fair Labor Standards Act<sup>19</sup> and the National Labor Relations Board<sup>20</sup> have both consistently so ruled; and the great weight of judicial authority has supported this position.<sup>21</sup>

It is not clear from the opinion of the court below what reasoning or authority was thought to support its restrictive interpretation of "commerce." While the opinion states that the court adheres to its previous ruling (in *Atlantic Co. v.*

that such defenses lacked substantial merit and were not in the interests of the United States. For a time the Department also instructed the U. S. Attorneys to advise private counsel for the contractors that it was the opinion of the Department that such defenses lacked substantial merit. The Secretaries of War and the Navy were advised of the Attorney General's views. Nevertheless private counsel for the contractors have raised such defenses in the instant and in other cases.

<sup>19</sup> Quoted in 22 Comp. Gen. Dec. 277, 281.

<sup>20</sup> In the *Matter of Reynolds Corp.*, 74 N. L. R. B. No. 248; see also decisions cited in the Memorandum for the United States on Petition for Writ of Certiorari, p. 3, fn. 1.

<sup>21</sup> See *Bell v. Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813; *Umthun v. Day and Zimmerman*, 235 Iowa 293, and the list of trial court decisions in the Memorandum for the United States in support of the petition for certiorari, pp. 4-5. See also *Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Board*, 101 F. 2d 841, 843 (C. C. A. 4), where the court rejected the argument that the construction of men-of-war for the U. S. Navy could not be considered interstate commerce within the meaning of the National Labor Relations Act because such ships were "not designed to serve as carriers of commodities for sale or barter," pointing out that such vessels nevertheless were "intended to navigate the public waters of the United States and to transport persons and property from state to state and to foreign countries" [citing the *Caminetti* and other decisions].



*Walling*, 131 F. 2d 518) that "the Congress in defining 'commerce' intended to give to the term the broadest possible meaning," it held that this would not include "the transportation during war of Government owned munitions." Its reliance upon the Second Circuit's decision in *Divins v. Hazeltine Electronics Corp.*, *supra*, suggests that it was the war use of the goods which led the courts to conclude there was no commerce. However, the court itself specifically states that if it were convinced that defendant, as an independent contractor, had been "engaged under its contract in the business of manufacturing munitions of war" for sale to the Government, it would be of the opinion that defendant was within the Fair Labor Standards Act. If the court's decision rests on the fact that the Government owned the materials during production and transportation,<sup>14</sup> this is inconsistent.

<sup>14</sup> "It is generally recognized that, as far as commerce is concerned, the one who owns the goods when transportation is effected is immaterial." *Jackson v. Northwest Airlines*, 75 F. Supp. 82, 89 (D. Minn.); *Santa Cruz Co. v. Labor Board*, 308 U. S. 453, 463.

The statement in the opinion in the instant case that transportation was "by the Government" (R. 251) is not supported by the record. Under the contract respondent was charged with "the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions" (R. 45-46, 81). A later amendment to the contract indicates more specifically that the transportation was to be effected by the contractor rather than by the Government: "The Contractor shall, as directed by the Contracting Officer's Representative, transport or cause to be transported,

ent with its statement that its decision did not conflict with *Bell v. Porter, supra*, and is also contrary to its decision in *St. Johns River Shipbuilding Co. v. Adams*, 164 F. 2d 1012, decided

by subcontract or otherwise, any of the products of said Plant at such points within the continental United States as may be designated" (R. 114). There is no indication in the opinion of the court below whether it attached any particular significance to this factor. See *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. 2d 129 (C. C. A. 9), holding the mining and sale of gold to the Government, where the gold was delivered to the mint in the state of production, there commingled with the product of other producers, and then transported by the Government to a mint in another State, was not "commerce" within the National Labor Relations Act because the interstate shipments were made "not as commercial transactions, but as administrative acts of Government." The court emphasized the fact that the producer in that case did "not make these [interstate] shipments or cause them to be made". 98 F. 2d at 131. Cf. *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. 2d 780 (C. C. A. 9), certiorari denied, 312 U. S. 678; *Canyon Corp. v. National Labor Relations Board*, 128 F. 2d 953 (C. C. A. 8); *Walling v. Haile Gold Mines*, 136 F. 2d 102 (C. C. A. 4); *Fox v. Summit King Mines*, 143 F. 2d 926 (C. C. A. 9); *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28, 32-33 (S. D. Iowa), refusing to apply the *Idaho-Maryland* decision where the producer or contractor made or was obliged to arrange for the interstate shipment. Apart from the doubts as to the legal soundness of the *Idaho-Maryland* doctrine (see *Timberlake v. Day & Zimmerman, supra*, at 32-33), the courts (including the Ninth Circuit which originated it, see *Sunshine Mining Co. case, supra*) have limited the doctrine strictly to the facts of that case. As noted above, the record here does not support the assumption that the interstate shipment was made by the Government.

the same day as the instant case. In the *St. Johns River* case, the same court held that the construction of "Liberty-ships" for the United States under a cost-plus contract, at a Government-owned shipyard, using only Government-owned materials and tools, was covered by the Act, because the ships might serve "commercial" as well as war purposes.

Thus the court below evidently conceded that neither the Government ownership nor the war use, standing alone, would suffice to exclude the transportation of munitions from the scope of the statutory definition of "commerce". There would seem no greater reason for concluding that the two factors combined have that effect. The court below, like the Second Circuit in *Divins v. Hazeltine Electronics Corp.*, 163 F. 2d 100,<sup>10</sup> appears to have been particularly influenced by the view that something produced and transported solely for war (noncommercial) purposes could not be "commerce" in the constitutional or statutory sense. But, as pointed out *supra*, this view would appear to be precluded by the long line of decisions of this Court holding that any transportation of goods across State lines is "commerce"

<sup>10</sup> The *Divins* decision that the movement of battleships, etc., is not commerce does not go so far as to hold that the transportation of munitions for future military use is not commerce. On the contrary the Second Circuit held that armed cargo transports carrying munitions to the war zones would be engaged in commerce, a situation more analogous to that in the present case. 163 F. 2d at 102. For this reason we do not think the *Divins* case supports the decision below in this case.

whether or not "commercial" in character. We know of no authoritative precedents to the contrary.

The court below itself recognized in its opinion in the *St. Johns River* case (164 F. 2d at 1014) that the fact that interstate transportation is for war purposes does not preclude its also being "commerce." Certainly transportation by rail of Government-owned war material is interstate commerce for purposes of the Interstate Commerce Act. Cf. *United States v. Powell*, 330 U. S. 238; *Northern Pacific R. Co. v. United States*, 330 U. S. 248. It seems clear that the powers granted Congress under the Constitution, are not mutually exclusive. Thus the Government has in the past acted simultaneously under the "war" and "commerce" powers (see *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326-330); as it also frequently proceeds simultaneously under its power over "commerce" and over the mails. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 11; *Electric Bond & Share Co. v. Securities & Exchange Comm.*, 303 U. S. 419, 432-433. The courts have consistently held that contractors carrying mail for the Government in the exercise of the postal power are within the scope of statutes regulating labor relations and standards under the commerce power. *National Labor Relations Board v. Carroll*, 120 F. 2d 457 (C. C. A. 1); *Fleming v. Gregory*, 36 F. Supp. 776



(E. D. La.). *Thompson v. Daugherty*, 40 F. Supp. 279 (D. Md.); *Magann v. Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W. D. Va.). No reason has been advanced for reaching a different result with respect to contracts entered into under the war power. On the contrary, the statutory purpose to prevent the spread of undesirable working conditions through the use of the channels of interstate commerce would seem to require the maintenance of labor standards in the production of materials to be transported by the Government for war uses no less than to require such standards in the production of goods to be transported for non-war purposes.

The belief, which apparently weighed heavily with the court below (R. 253; see also opinion in *St. Johns River* case, 164 F. 2d at 1015), that the national interest would not be served by holding the Act applicable to employees in munitions factories, clearly did not warrant the result reached. This consideration would seem to be more properly addressed to the legislative than to the judicial branch of the Government. Congress, although fully advised of the fact that the Act was being applied to employees of contractors engaged on Government war contracts,<sup>11</sup> did not

<sup>11</sup> House Hearings before the Committee on Naval Affairs, 77th Cong., 2d Sess., on H. R. 6790; Senate Hearings before the Subcommittee of the Committee on Appropriations, 77th Cong., 2d Sess., on H. R. 6736, Part II (on "*Progress of the War Production Program*"); Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1942, pp.

see fit to enact any of the numerous proposed amendments designed to exempt such workers from the Act.<sup>12</sup>

The suggestion by the court below (R. 253) that the application of the overtime provisions of the Act to war production would "fasten shackles on the nation's feet as it marches to war" and "hinder the Government in \* \* \* providing for the common defense" is contradicted by all official expressions of policy during the war, military as well as civil. The unanimous testimony of the officials of the War, Navy and Labor Departments and of the War Production Board was that war production might be harmed rather than helped by suspension of the overtime provisions of the Act. See Senate Hearings before the Subcommittee of the Committee on Appropriations on H. R. 6736, Part II (on "*Progress of the War Production Program*"), 77th Cong., 2d sess.; House Hearings before the Committee on Naval Affairs on H. R. 6790 ("a bill to permit performance of essential labor on naval contracts without regard to laws and contracts limiting

2-3. See also Annual Report of the Administrator of the Wage and Hour Division to Congress for the years ending June 30, 1944, p. 11, and June 30, 1946, pp. 1-2.

<sup>12</sup> Some eighteen bills were introduced in Congress proposing the suspending or restricting of the overtime provisions of the Act for the war's duration. Senate Bills Nos. 2232, 2373, and 2894, and House Bills Nos. 6616, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6926, 6935, 7054, and 7731 of the 77th Congress, 2d Session; Senate Bills 190 and 237, and House Bill 992 of the 78th Congress, 1st Session.

hours of employment, etc."), 77th Cong., 2d sess. Under-Secretary of War Patterson stated that suspension of the overtime provisions would cause such a "violent change in the basis on which labor relations have been conducted" that it "might result in deterioration of labor relations \* \* \* and \* \* \* in decrease of production" (Senate Hearings, *supra*, p. 20; House Hearings, p. 2476). He unqualifiedly asserted that "There is no occasion for their suspension" (House Hearings, *supra*, at p. 2477)." See statements by Assistant Secretary of Navy Bard, Senate Hearings, *supra*, at p. 38, House Hearings, *supra*, at p. 2541; by War Production Board Chairman Nelson, Senate Hearings, *supra*, pp. 48, 56; by William S. Knudsen, Director of Production, War Department, Senate Hearings, *supra*, at p. 43; by Secretary of Labor Perkins, Senate Hearings, *supra*, pp. 80-81, 92-93, House Hearings, *supra*, pp. 2626-2632. The testimony of these officials leaves no doubt that during the war they were

"The national interest still requires that federal labor legislation regulating "commerce" be held applicable to employees in Government-owned, privately-operated plants producing munitions for war. See *United States v. Carbide & Carbon Chemicals Corp.* (E. D. Tenn., Civil No. 1093, decided March 19, 1948), where the Labor Management Relations Act of 1947 was recently invoked to enjoin a threatened strike at the Oak Ridge National Laboratory (owned by the United States and operated under contract between the U. S. Atomic Energy Commission and the Carbide & Carbon Chemicals Corp.), on the ground that it would affect an industry "engaged in \* \* \* commerce" and "in the production of goods for commerce."

agreed that adherence to the statutory overtime standards had a stabilizing influence in that it reduced demands for increases in basic wages and prevented the agitation attendant upon such demands and also afforded incentive for the necessary longer hours. While it was recognized that payment of time and one-half for overtime might cost the Government several billion dollars (see House Hearings, *supra*, at p. 2553), it was agreed by the above officials that this expense was preferable to the incalculable expense and disruption that might result from demands for increases in basic wage rates if overtime compensation were suspended.

That Congress was aware of and recognized the applicability of the Act to employees of cost-plus contractors with the Government is conclusively evidenced by the enactment of the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., Chapter 52—1st Sess.). In its findings in Section 1 (a) (9) of the Portal Act Congress stated that if certain liabilities under the Act were permitted to stand, "the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts." The Committee Reports of both Houses of Congress referred to the added cost to the Government by virtue of liabilities to cost-plus contractors if the



portal-to-portal suits by employees were successfully prosecuted. See S. Rept. 48, 80th Cong., 1st Sess., pp. 32-39, and H. Rept. 71, 80th Cong., 1st Sess., pp. 4-6. Thus Congress both during and after the war seems never to have doubted that the Act covers employees of cost-plus contractors with the Government who were engaged in the production of munitions of war.

We believe that in the Portal Act, Congress indicated the extent to which it felt liability should be limited for failure to comply with the statutory standards in the execution of these contracts.<sup>20</sup> When consideration is given to the high proportion of the country's productive capacity which was devoted to the production of materials of war under cost-plus contracts, and the drastic curtailment of the scope of the Act if such production were excluded, it does not seem reasonable to read into the Act by implication the far-reaching exemption suggested in the opinion of the court below, in the absence of clear and substantial evidence that Congress intended such exemption.

It thus appears that the decision of the court below that the munitions were not produced for "commerce" rests on a misconception that "com-

<sup>20</sup> The Portal-to-Portal Act is also a recognition by Congress that employees of contractors with the Government are not excluded from the Act as Government employees; see Point I, *supra*. The defenses provided in the Portal Act may, of course, still be asserted in the instant case in the event of reversal of the decision below.

merce" is confined to commercial transactions, is contrary to the controlling decisions of this Court as well as to the clear terms of the statutory definition, and is inconsistent with the apparent intent and understanding of Congress.

### III

#### SECTION 3 (i) DOES NOT EXCLUDE RESPONDENT FROM THE SCOPE OF THE ACT

Section 3 (i) of the Fair Labor Standards Act defines "goods" as used in the Act as meaning all commodities, excepting "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." The court below held that even if it were wrong in holding the munitions not to be articles of commerce and the United States to be the producer, "the Act, under sub-paragraph (i) of Sec. 3, would still be inapplicable because the term 'goods' 'does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer or processor thereof.' " (R. 252-253).

Plainly, Section 3 (i) was not intended to exempt from the Act employees working on the goods during the course of production, manufacture or processing. Here the employees of the contractor were not working on the goods *after* their delivery to the United States as ultimate consumer but while the goods were being manu-

factured or processed. Thus they plainly do not come within the language of the exempting clause, which relates only to "goods after their delivery into the actual physical possession of the ultimate consumer".<sup>21</sup>

The court below apparently was of the view that if the ultimate consumer took delivery within the state in which the goods were manufactured or produced, the subsequent interstate transportation by the consumer could not be taken into account in determining whether the goods were produced for commerce. Such a construction has the effect of extending the exemption to the producer and manufacturer. The result would be that if an ultimate consumer takes delivery within the state, the producer's operations are exempt, but if the consumer takes delivery after interstate transportation the producer's operations would be covered—although in each instance it was known that the goods were destined for interstate shipment.

<sup>21</sup>The record does not indicate that the Government, *before* the munitions were produced by petitioners, ever had physical possession, as distinguished from title, of any of the materials. But, assuming that some of the raw materials may have previously been in the hands of the United States, the "goods" which petitioners were producing, the munitions, were not delivered into the "actual physical possession" of the United States until *after* petitioners had produced them. In any event it seems clear that the delivery referred to in Section 8 (i) is delivery to the ultimate consumer for use in consumption and not for further processing, so that it is immaterial whether the raw materials had previously been in the "actual physical possession" of the Government.

Furthermore, since the exempting clause itself excludes the ultimate consumer who is also a "producer, manufacturer or processor," the result of the construction adopted by the court below would be to bring within the Act the manufacturing operations of an ultimate consumer who carries the goods across state lines, but to exempt the same operations if carried on by an independent manufacturer who sells to the ultimate consumer within the state.

It is only necessary to give Section 3 (i) a literal sensible reading to avoid these anomalous results. Such an interpretation of the exempting clause as not affecting the status of the goods while they are being produced (whether by the consumer or before delivery to him) is in accord not only with the terms of the statute, but with its purpose and history. Furthermore it has been the interpretation consistently adopted by the Government—Wage and Hour Administrator<sup>22</sup> and

<sup>22</sup> Administrator, Wage and Hour Division, Department of Labor, Interpretative Bulletin, No. 5 (Revision of November 1939), par. 6, 1940 Wage and Hour Manual 131, 133. This paragraph was readopted without change in the July 1947 revision of the Administrative Interpretations. See 29 C. F. R. Part 776.7(h), 19 Fed. Reg. 4583, 4585. The paragraph reads in part as follows:

"The fact that products lose their character as 'goods' when they come into the actual physical possession of the ultimate consumer does not affect the coverage of the Act as far as the employees producing the products are concerned. The facts at the time that the products are being produced determine whether an employee is engaged in the production of goods for commerce, and at the time of the production of the con-



Department of Justice"—and accepted by the Circuit Courts of Appeals, including the Fifth Circuit except in this case and another decision

tainers they were clearly 'goods' within the meaning of the statute since they were not, at that point of time, in the actual physical possession of the ultimate consumer. All that the term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of section 15 (a) (1). This seems clear from the language of the statute. Thus section 15 (a) (1) makes it unlawful for any person 'to transport \* \* \* (or) \* \* \* ship \* \* \* in commerce \* \* \* any goods' produced in violation of the labor standards set up by the act. By defining 'goods' in section 3 (i) so as to exclude goods 'after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof,' the Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15 (a) (1) if he should transport 'hot goods' across a State line. Thus, if a person purchases a pair of shoes from a retail store and carries the shoes across a State line, the purchaser is not, in our opinion, guilty of a violation of section 15 (a) (1) if the shoes were produced in violation of the wage or hour provisions of the statute. But Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside the State. Thus, it is our opinion that employees engaged in building a boat for delivery to the purchaser at the boatyard are within the coverage of the act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe that the purchaser will sail it outside the State."

" See the following briefs filed by the Solicitor General in this Court: brief in opposition, *Hamlet Ice Co. v. Fleming*, 317 U. S. 634, 1942 Term, No. 104; brief in opposition, *Enterprise Box Co. v. Walling*, 316 U. S. 704, 1941 Term,

in which this Court granted certiorari on this question, *inter alia*, but subsequently vacated the Fifth Circuit's decision on another ground. *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165, 170-171 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman v. Home Ice Co.*, 136 F. 2d 353, 355 (C. C. A. 6), certiorari denied, 320 U. S. 761; *Enterprise Box Co. v. Walling*, 125 F. 2d 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Atlantic Co. v. Walling*, 131 F. 2d 518, 521 (C. C. A. 5). Contra: *Walling v. Reuter, Inc.*, 137 F. 2d 315 (C. C. A. 5), judgment vacated, 321 U. S. 671." Many

No. 1275, p. 6; petition for certiorari (pp. 8-9), and brief on the merits, pp. 13-17, *Walling v. Reuter, Inc.*, 321 U. S. 671, 1943 Term, No. 436; brief on the merits, p. 17, in *Roland Electrical Co. v. Walling*, 326 U. S. 657, 1945 Term, No. 45. The brief in the *Hamlet Ice* case, filed in 1942, stated on this point (pp. 4-5):

"Section 3 (i) excludes from the term 'goods' products 'after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.' [Italics supplied.] Since petitioner produces goods *before* their delivery to the ultimate consumer, it does not come within this provision. As the language of the clause indicates and as the court below held (R. 179-180), the purpose of the provision was not to make the Act inapplicable to producers, but to protect the ultimate consumer who carries goods across state lines as his personal property from the prohibitions of Section 15 (a) (1). Manifestly, even if the carriers be regarded as ultimate consumers, the fact that the ice might not be goods while in their possession does not relate back to destroy its character as 'goods' at the time of production."

"*Divins v. Haseltine Electronics Corp.*, 163 F. 2d 100 (C. C. A. 2), is not to the contrary. The employees of the contractor there held not subject to the Act were installing,

other decisions which contain no specific reference to Section 3 (i) hold the Act applicable to employees engaged in production for commerce in identical or similar circumstances, although the "goods" being worked on were owned by the "ultimate consumer."

servicing, and maintaining equipment on war vessels owned by the United States. After having held, we think erroneously, that the subsequent movements of the vessels could not be regarded as interstate or foreign commerce (as to which see Point II, *supra*, pp. 23-37), the court concluded (163 F. 2d at 103-104) that the employees were working on the goods after their delivery to the possession of the ultimate consumer, and not in the course of production for subsequent commerce. In that case, the court found that the work was performed after the equipment had "been delivered into [the] actual physical possession" of the United States "prior to the time when the plaintiffs did any work upon it", and that there was no commerce after this delivery to the United States. *Id.*, at 101-102. The opinion reaches the "opposite result" as to work on armed cargo transports which it found to be instruments of commerce and not of war. As to these the court found that the United States was a processor of the equipment for commerce (*id.*, at 104). The court was clearly therefore not misinterpreting Section 3 (i) as excepting the production of goods before their delivery to the ultimate consumer for interstate transportation; on its understanding of "commerce", it had no such case before it, and its opinion was not addressed to any such situation. See also *Phillips v. Star Overall Co.*, 149 F. 2d 416 (C. C. A. 2), certiorari denied, 327 U. S. 780.

<sup>22</sup> *Bell v. Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813; *Landreth v. Ford, Bacon & Davis*, 147 F. 2d 446 (C. C. A. 8); *Anderson v. Federal Cartridge Corp.*, 62 F. Supp. 775 (D. Minn.), affirmed, 156 F. 2d 681 (C. C. A. 8); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 639 (D. Minn.); *Umthun v. Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258; *Timberlake v. Day & Zimmerman*, 49 F.

The *Hamlet Ice*, *Home Ice*, and *Atlantic* cases each involved manufacturers of ice who sold it within the state to interstate railroads for consumption in refrigerating railroad cars. Judge Soper's opinion for the Fourth Circuit in the *Hamlet* case, which was followed in the other two cases, rejects the argument that delivery to the consumer exempts the producer; his opinion states (127 F. 2d at 170-171):

The appellant claims, in addition that its activities are outside the statutory scheme on the particular ground that all the goods it produces are delivered to the ultimate consumer and are therefore excluded by the definition of goods set out in § 3 (i) of the Act. \* \* \*

The contention is that the word "goods" is subject to the exception wherever it occurs in the Act, and therefore the Ice Company produces nothing and sells nothing within the intendment of the Act. We do not think this argument is sound. It disregards the precise terms of the section

Supp. 28 (S. D. Iowa); *Jackson v. Northwest Airlines*, 75 F. Supp. 22 (D. Minn.); *Roland v. United Airlines*, 6 W. H. Cases 663 (N. D. Ill., 1947); *Sweetman v. Remington Rand*, 6 W. H. Cases 836 (S. D. Ill., 1946); *Reid v. Day & Zimmerman*, 73 F. Supp. 892 (S. D. Iowa); *U. S. Cartridge Co. v. Powell*, no opinion (E. D. Mo., May 19, 1947); *Lasater v. Hercules Powder Co.*, 73 F. Supp. 264 (E. D. Tenn.); *Bailey v. Porter*, 6 W. H. Cases 1017 (N. D. Ill., 1947); *Ware v. Goodyear Engineering Corp.*, 6 W. H. Cases 160 (S. D. Ind., 1946); *Moehl v. du Pont de Nemours & Co.*, 6 W. H. Cases 638 (N. D. Ill., 1947).



that the goods excluded are not those in the possession of the maker but "goods *after* their delivery into the actual physical possession of the ultimate consumer". Goods in the course of production are therefore not expressly excluded and exclusion, we think, should not be implied. \* \* \* It seems clear that the exclusion clause was intended to apply only to goods which, having come into the hands of the ultimate consumer, have been withdrawn from further traffic and sale, so that interstate transportation of the goods may take place without responsibility for a prior production in violation of the standards of the Act. This narrow purpose is evidenced by limiting the exclusion to "the ultimate consumer \* \* \* other than a producer, manufacturer, or processor thereof".

Under the terms of the exclusionary clause, the applicability of the exemption necessarily depends upon two conditions: (1) that the United States was not "a producer, manufacturer or processor" of the goods, and (2) that the goods were in "the actual physical possession" of the United States as an "ultimate consumer." If, as respondent contends, the United States is the real employer here and is at all times in control of the operations, then the United States is clearly "a producer, manufacturer, or processor" of the goods in question and condition (1) has not been met. Thus, Section 3 (i) can be relied upon only as an alternative defense in the event that the respond-

ent, and not the United States, is held to be the employer-producer. But in this event, condition (2) could not be met, for the goods while being worked on were obviously in "the actual physical possession" of the producer.

The use of the words "actual physical possession" negates the idea that mere title or ownership suffices. The terms of the contract between respondent and the United States make it clear that only title, and not physical possession, was retained by the United States during the performance of the contract. Thus the contract provides that property "title to which is or may hereafter become vested in the Government, will be used by or will be *in the care, custody or possession of the Contractor* in connection with the performance of this contract" (R. 114-115; [italics supplied]). It also provides that the contracting officer (representing the Government Department or agency concerned) "shall at all times have access to the premises, work, and materials, etc." (R. 74) and that in case of termination through the fault of the contractor, he "may enter upon the premises and take possession" (R. 68-69)—provisions inconsistent with the contention that the Government retained "actual physical possession" of the materials and goods during the performance of the contract. Thus, it seems clear that during the course of production the materials being worked on were in the "actual physical possession" of the respondent. Under the literal language of the

exclusionary provision materials worked on remain "goods" as long as they are in the actual physical possession of a producer even if the producer be the ultimate consumer. Therefore it would seem to follow from the literal statutory language that the materials here were "goods."

This conclusion is confirmed by other provisions and the general framework of the Act, by the legislative history, and by the judicial decisions construing Section 3 (i).

There seems ample evidence on the face of the statute itself that there was no intent to exclude the productive process or the producer from the statutory standards. First, there is the explicit provision in Section 3 (i) itself that the exclusion does not apply to a producer even if he be the ultimate consumer. There is also the comparable provision in Section 15 (a) (1), which protects a common carrier from liability for transportation of "hot" goods, and limits this protection to "*goods not produced by such common carrier.*" [Italics supplied.] Furthermore, while the constitutional authority for the statute rested primarily on the Congressional power directly to regulate or prohibit movement across State lines of tainted or "hot" goods, the basic policy of the Act, as expressed in the findings and declaration of policy (Section 2 (a)), was to eliminate the substandard labor conditions at their source—in the factory or plant of the producer for interstate shipment. See *United States v. Darby*, 312 U. S.

100, 117. While there are obvious reasons justifying protection of the innocent consumer from liability for substandard conditions maintained by a producer, no reasonable basis has been suggested for relieving a producer from liability for the substandard conditions in his own plant. To imply such release of the producer is inconsistent with the whole policy of the Act.

The legislative history affords further evidence that Congress advisedly phrased the exclusionary clause so as to protect the ultimate consumer without curtailing the liability or responsibility of the producer. In the bill as originally introduced in the Senate, the definition of "goods" provided that it "shall not mean goods in the possession of the ultimate consumer thereof" (S. 2475, introduced May 24, 1937, 75th Cong., 1st sess., Section 2 (a) (21)). The representatives of the National Association of Manufacturers and of the Chamber of Commerce criticized this bill as affording adequate protection only to the ultimate consumer and not to producers, distributors and other businessmen. See statement of James A. Emery, General Counsel, National Association of Manufacturers, and George H. Davis, President, Chamber of Commerce of the United States. Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st sess., on S. 2475 and H. R. 7200, pp. 639, 936-937. The President of the Chamber of Commerce objected specifically on the ground that



if a producer of grain maintained substandard conditions, the grain "in the hands of mill purchasers, and possibly in the hands of bakers that bought flour made from the wheat" would "contain that taint" and "only the ultimate consumer, who bought the bread to use at home, would be safe from Federal prosecution" (*id.* at 937). The General Counsel of the National Association of Manufacturers also indicated his understanding that the exclusionary clause in the definition of the term "goods" only "exempts the ultimate consumer from any criminal liability for any part he might play in the interstate transportation of such unfair goods" (*id.* at 639). Thus although the representatives of manufacturers and businessmen urged that the protection not be thus limited but be extended generally to "innocent purchasers without notice" (*id.* at 937), Congress not only failed to broaden the protection but on the contrary narrowed the scope of the exclusionary clause by prefacing the word "possession" with the phrase "after their delivery into the actual physical," and by making explicit its limitation to an ultimate consumer "*other than a producer, manufacturer or processor thereof*" [italics supplied]. At the same time Congress dropped the provisions of earlier bills which would have permitted the Board to extend the protection under certain specified circumstances.<sup>29</sup>

<sup>29</sup> Sec. 21 (d) of S. 2475 as originally introduced would have permitted the administrative board to relieve others

That the intent was to exempt only the ultimate consumer from the Act and not the producer would seem sufficiently evident from the proviso in the exclusionary clause making the exemption inapplicable even to an ultimate consumer of goods if he also was "a producer, manufacturer, or processor thereof." The contrary conclusion of the court below is predicated on the reasoning that if the munitions were not "goods" in the hands of the ultimate consumer (the Government) they could not take on the character of goods in the producer's hands by reason of the subsequent interstate movement by the ultimate consumer, that is, that the movement "by the ultimate consumer over state lines would not relate back and take the goods out of the exception" of Section 3 (i).

from liability for transportation of goods upon a finding by the board that they "had no reason to believe that any substandard labor condition existed in the production of such goods" or that such relief was "necessary to prevent undue hardship or economic waste and is not detrimental to the public interest," provided that adequate provision was made for reparation of underpayments to employees. The bill as reported to the Senate July 8, 1937, after the hearings, included, in addition to the above-quoted sections, a provision authorizing the Board to issue certificates of compliance which might be relied upon by any purchaser or transporter of goods to demonstrate that he had "no reason to believe any substandard labor condition existed in the production of such goods." S. 2475 accompanying S. Rept. No. 884, Section 14 (c). Similar provisions were in the bill as reported to the House on August 6, 1937 (S. 2475), accompanying H. Rept. No. 1452, section 2 (a) (14), 18 (c), 14 (b). None of them appeared in the bill as passed by the House on May 24, 1938.

(R. 253.) The fallacy of this reasoning is that it disregards the obvious purpose of the provision to protect the ultimate consumer without depriving the producer's employees of the statutory standards. This purpose is clear from the fact that if the ultimate consumer is a producer he explicitly is not exempt under Section 3 (i). It would seem to follow, *a fortiori*, that a producer who is not an ultimate consumer would not be exempt. But, under the court's reasoning the Act would apply to the employees of an ultimate consumer who was working on his own goods but would not apply to the same employees working on the same goods if they were employed by an independent contractor engaged by the ultimate consumer to do the work. This would make the exemption depend wholly upon "the capricious incidence of the act resulting from the accident of the industrial division of the whole process." See *Fleming v. Arsenal Building Corp.*, 125 F. 2d 278, 280 (C. C. A. 2), affirmed, 316 U. S. 517.

The interpretation of the court below would have serious effects not only in cases involving Government contractors, but in the application of the Act generally. Under respondent's theory, any producer of goods plainly intended for shipment across State lines might secure the exemption simply because the consumer-purchaser took title or delivery of the goods before the interstate shipment. Thus, contrary to the consistent rule

ing of the courts," the producer of ice for use in icing railroad cars, although knowing that the ice was destined for interstate shipment, would be exempt because the railroad took delivery of the ice before it crossed State lines. Other anomalous effects of this construction may be illustrated by reference to cases that have arisen under the Act. In *Slover v. Wathen*, 140 F. 2d 258 (C. C. A. 4), one company maintained a dock at which it repaired barges owned by an affiliated company. Employees repairing the barges were considered engaged in the production of goods for commerce. Since the court considered the two companies as one, the ultimate consumer of the barges was also the producer thereof, and the consumer clause was therefore inapplicable. But under the theory of the court below, if the company which operated the barges was deemed independent of the company which repaired them, the same employees performing the same work would no longer be engaged in the production of "goods" because "the ultimate consumer" was not a producer thereof. Similarly, in *Hertz Drivursel Station v. United States*, 150 F. 2d 923 (C. C. A. 8),

<sup>27</sup> See *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165, 170-171 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman v. Home Ice Co.*, 136 F. 2d 353, 355 (C. C. A. 6), certiorari denied, 320 U. S. 761; *Atlantic Co. v. Walling*, 131 F. 2d 518, 521 (C. C. A. 5); *Gordon v. Paducah Ice Mfg. Co.*, 41 F. Supp. 980, 986 (W. D. Ky.).



employees repairing trucks owned by their employer were held to be engaged in the production of goods for commerce because the trucks were used in interstate transportation. If the construction of the court below were adopted, employees working on such trucks would be working on "goods" if they were employed by the truck owner but not if they were employed by an independent contractor.

Section 3 (i) obviously was not calculated to achieve such capricious results. Such an interpretation, contrary to the established principle of strict construction of exemptions from this remedial Act (see *Phillips Co. v. Walling*, 324 U. S. 490, 493), would distort the simple restricted purpose of the exclusionary clause into far-reaching and irrational exemptions.

#### CONCLUSION

For the above reasons it is respectfully submitted that the opinion of the court below is incorrect on each of the points decided.

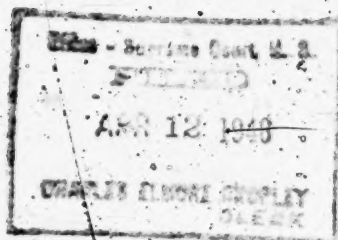
**PHILIP B. PERLMAN,**  
*Solicitor General.*

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*Special Assistant to the Attorney General.*

**APRIL 1948.**



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No. 590

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1947**

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**HARRIS KENNEDY, ET AL.**

**v.**

**SILAS MASON COMPANY**

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**ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

**BRIEF OF HERCULES POWDER COMPANY,  
AS AMICUS CURIAE**

✓ *John*  
**J. R. L. JOHNSON, JR.**  
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**BRIEF OF HERCULES POWDER COMPANY,  
AS AMICUS CURIAE**

---

By written consent of all parties to this case, Hercules Powder Company submits this brief on its behalf as amicus curiae.

**PRELIMINARY STATEMENT**

This is an action by Harris Kennedy and others against Silas Mason Company for overtime compensation and other relief under the Fair Labor Standards Act of 1938. The United States District Court for the Western District of Louisiana denied Respondent's motion for summary judgment, 68 F. Supp. 576, and on rehearing set aside such order and granted the motion, 70 F. Supp. 929. On appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court, 164 F. (2d) 1016.

The Respondent, Silas Mason Company, during the late war constructed and operated for the United States of America an ordnance plant at Shreveport, Louisiana,

known as Louisiana Ordnance Plant, under the terms and provisions of a cost-plus-a-fixed-fee contract with the United States of America. The Petitioners sue for over-time, penalties and attorneys' fees which they claim to be due from the Respondent under the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. Secs. 201-219, alleging they had been employed at that facility in interstate commerce and in the production of goods for commerce within the meaning of 29 U.S.C., Sec. 203.

During World War II, Hercules Powder Company operated Badger Ordnance Works, Baraboo, Wisconsin, Missouri Ordnance Works, Louisiana, Missouri, New River Ordnance Plant, Pulaski, Virginia, Sunflower Ordnance Works, Lawrence, Kansas, Radford Ordnance Works, Radford, Virginia and Volunteer Ordnance Works, Tyner, Tennessee, for the United States of America pursuant to cost-plus-a-fixed-fee contracts covering each Ordnance facility. These were all new Ordnance facilities constructed for the purpose of manufacturing or processing munitions of war for the Government. The contracts under which Hercules operated such Ordnance facilities are substantially identical with the contract under consideration in this case and the services performed by Hercules Powder Company at the facilities named above were similar in kind to the services rendered by the Respondent to the Government in the operation of Louisiana Ordnance Plant.

Since the termination of the operations of the reference Ordnance facilities, Hercules Powder Company has been made party defendant to 28 separate actions of various types under the Fair Labor Standards Act of 1938, in which actions a total liability of approximately \$10,000,000 has been asserted against it. An accurate estimate of the potential exposure of Hercules Powder Company under the Fair Labor Standards Act resulting from the operation of Ordnance facilities under cost-plus-a-fixed-fee contracts cannot presently be made. While all costs and expenses including any final judgments which might be rendered in



the actions now pending are reimbursable to Hercules Powder Company by the United States of America under the terms of the operating contracts, it nevertheless appears that Hercules Powder Company has a substantial interest in the outcome of the instant case. Therefore, we deem it proper that this brief as *amicus curiae* be filed herein and we respectfully request the Court's consideration thereof.

### SUMMARY OF ARGUMENT

It is the contention of Hercules Powder Company that the Petitioners in this case and all persons similarly situated were not covered by the provisions of the Fair Labor Standards Act of 1938 for the following reasons:

I. In order for the Petitioners to recover in this case, it is necessary that they establish that they were engaged in commerce or in the production of goods for commerce. The manufacture or other processing of munitions of war from Government-owned materials at Government-owned Ordnance facilities and the transportation of the same across state lines by the United States of America does not constitute commerce or the production of goods of commerce within the meaning of the Fair Labor Standards Act of 1938. Therefore the Petitioners are not within the coverage of the Act.

II. The contractors who operated Government-owned Ordnance facilities for the production of munitions of war pursuant to the terms of a cost-plus-a-fixed-fee contract with the United States of America were subject to the control and direction by the United States of America to the extent that they constituted an instrumentality of the United States. Therefore they enjoyed the express immunities of the sovereign from the regulatory provisions of the Fair Labor Standards Act.

III. The end products of the Government-owned Ordnance facilities operated by cost-plus-a-fixed-fee contractors

were munitions of war. These munitions of war were not goods as that term is defined by the Fair Labor Standards Act because the articles manufactured were not "subjects of commerce" and were in the actual physical possession and under the control of the ultimate consumer thereof, during all stages of manufacture. Therefore the Petitioners herein were not engaged in the production of goods for commerce.

## ARGUMENT

### I.

#### THE MANUFACTURE OF MUNITIONS OF WAR BY THE RESPONDENT WAS NOT COMMERCE

The acquisition, construction and operation of Louisiana Ordnance Plant was done pursuant to the Act of July 2, 1940, c. 508, 54 Stat. 712 (Public No. 703, 76th Congr.), 50 U.S.C. App. Sec. 1171. In enacting this law, Congress was acting pursuant to the war powers granted to it by the Constitution. The source and nature of those war powers have been summarized elsewhere. *Ex parte Quirin*, 317 U.S. 1, 26.

In enacting Public Law No. 703, Congress was not attempting to exercise any powers granted to it under the Commerce clause of the Constitution, but it was providing for the procurement of national-defense material, national-defense premises and national-defense utilities, which were later to become war material, war premises and war utilities.<sup>1</sup> In thus authorizing the Secretary of War to contract for the construction, operation and maintenance of military defense facilities, the Congress did not purport to engage the federal Government in any form of commercial activities within the meaning of the term "commerce" as used in the Constitution.

Admittedly, the term "commerce" as used in the Constitution must be, and has been, given a broad interpreta-

<sup>1</sup> Act of April 20, 1918, c. 59, as added November 30, 1940, c. 928, 54 Stat. 1220, 50 U.S.C. Secs. 101, 104.

tion, and the courts have been reluctant to define it in exact terms. But always there has been recognized an ample perimeter beyond which the term "commerce" does not extend. Certainly it does not cover all forms of human activity. A practical concept of commerce is the passing of merchandise from one state to another and from one person to another to be sold in competition with other goods in ordinary channels of trade for profit.

This Court has many times attempted to define the term "commerce." Commerce is transportation of commodities since a sale is the object of importation. *Brown v. Maryland*, 25 U.S. 419, 446. Commerce is dealing in commercial products. *Oklahoma v. Kansas Nat. Gas. Co.*, 221 U.S. 229, 256. Commerce is the purchase, sale or exchange of merchandise for the purposes of trade. *Welton v. Missouri*, 91 U.S. 275, 280. Commerce is commercial intercourse. Goods are things which are bought and sold. Articles or subjects of commerce are those things tangible or intangible which are communicated, transmitted or transported as a business, for pay, or for profit, and as concomittants of business transactions. *Associated Press v. N. L. R. B.*, 301 U.S. 103, 128. Commerce suggests business dealings in articles of trade for profit, and this idea has never changed. In *Carter v. Carter Coal Company*, 298 U.S. 238, 297, this Court said:

"We first inquire, then—What is commerce? The term, as this court many times has said, is one of extensive import. No all-embracing definition has ever been formulated. The question is to be approached both affirmatively and negatively—that is to say, from the points of view as to what it includes and what it excludes. . . . As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states. . . ."

The power granted by the states to the federal Government through the Constitution in the Commerce clause was the power to regulate the economic and commercial transactions of the citizens of the various states. The activities of the federal Government in prosecuting war are authorized by the Constitution outside of and apart from the Commerce clause.

The acquisition and construction of Louisiana Ordnance Plant and the production of military explosives at that facility by the United States of America were accomplished for the sole purpose of successfully prosecuting the war in the defense of this nation. The sole output of this Government-owned facility was in munitions of war. This Court has given a broad definition to the term "military property for military use." Cf. *Northern Pac. Ry. Co. v. United States*, 330 U.S. 248. The manufacture of munitions of war at Louisiana Ordnance Plant lacked all the characteristics of commerce implied in the Constitution. They were not made to be sold, were not to be sold, and were not sold. The Government did not expect and will not gain a profit thereby. In a global war such products were not produced for any commercial purpose and therefore were not the subjects of commerce as that term is used in the Fair Labor Standards Act of 1938.

The Fair Labor Standards Act of 1938 purports to be a regulation of interstate commerce and its constitutionality was sustained on the ground that the enactment of the Act was a proper exercise of the commerce power granted to the federal Government by the United States Constitution. *United States v. Darby Lumber Company*, 312 U.S. 100. In enacting the Fair Labor Standards Act, the Congress had in mind that definition of "commerce" urged above. In the Declaration of Policy set forth in Section 2(a) of the Act, the Congress made a finding that there existed certain evils "in industry engaged in commerce or in the production of goods for commerce." (Emphasis supplied.) In this Declaration of Policy, Congress found that in



industry engaged in commerce or the production of goods for commerce, certain detrimental labor conditions existed which, among other things, "burdens commerce", "constitutes an unfair method of competition in commerce" and "interferes with orderly and fair marketing of goods in commerce." (Emphasis supplied.) These findings were not directed at nor are they applicable to the production or transportation by the United States Government of Government-owned munitions for the use of armed forces in the time of war. The waging of war by the Government is not an industrial pursuit. It cannot create unfair methods of competition and it involves no marketing of goods. Whatever meaning may be given to the term "commerce" of the Constitution, it is clear that the Congress in enacting the Fair Labor Standards Act did not intend and did not have in mind the production of munitions of war by the federal Government in its own plants either through Government employees or through the instrumentality of outside agencies, acting in its sovereign capacity in the defense of the national interest.

One District Court has succinctly summarized this entire argument:

"Prosecution of a war is not commerce. War is the negation of commerce. Often the purpose of a war and the result, usually, is to impair or destroy commerce, not to carry it on." *Divins v. Haseltine Electronics Corp.*, 70 F. Supp. 686, 689 (S.D. N.Y.)

Some courts have observed that the transportation by the federal Government of its own property across state lines to the armed forces is a type of transportation included in the definition of "commerce" in Sec. 3(b) of the Act.<sup>2</sup> This interpretation of the word "transportation" is unwarranted. The United States, by the terms of the Act, is excluded from the provisions thereof. Further, it is well

<sup>2</sup> *Clyde v. Broderick*, 144 F.(2d) 348 (C.C.A. 10th); *Umthun v. Day & Zimmerman*, 235 Iowa 293, 16 N.W.(2d) 258; *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28 (S.D. Iowa.)

established that statutes of general terms do not apply to the United States without express words to that effect. *United States v. United Mine Workers of America*, 330 U.S. 258. All that Congress intended by the insertion of the word "transportation" in the definition of "commerce" was to include those employees under the coverage of the Act who were engaged in the physical activity of moving the goods across state lines as contrasted with those employees who were engaged in producing the goods to be moved across state lines. The fact that an article crossed the state line is not conclusive of its being an article of commerce or of its being in interstate commerce. Certainly articles in the personal possession of the owner which crossed state lines with him are not goods in commerce even though there is a clear transportation thereof. Thus, baseball players who travel from state to state taking their paraphernalia with them are not engaged in interstate commerce and their employers or owners are not engaged in interstate business. As Mr. Justice Holmes said, speaking for this Court, "the transport is a mere incident, not the essential thing." *Federal Club v. National League*, 259 U.S. 200, 209.

The transportation by the United States of America of its munitions of war to the battlefronts was a mere incident to the purpose for which they were produced. They could serve no useful purpose stock-piled in this country. The transportation of the munitions of war by the United States has no bearing on the question of the coverage of the Act in this case. Cf. *N.L.R.A. v. Idaho-Maryland M. Corp.*, 98 F.(2d) 129, 131 (C.C.A. 9th).

The production of the munitions of war at the Louisiana Ordnance Plant and the transportation of such munitions of war to the battlefronts was not "commerce" as such term is used in the Constitution, or more particularly, as used in the Fair Labor Standards Act of 1938, and therefore, the Petitioners were not engaged in commerce or the production of goods for commerce.

## II.

A COST-PLUS-A-FIXED-FEE CONTRACTOR MANUFACTURING MUNITIONS OF WAR FOR THE UNITED STATES OF AMERICA OPERATES UNDER THE IMMUNITY PROVIDED FOR THE SOVEREIGN IN THE FAIR LABOR STANDARDS ACT.

In executing the task assigned to him, the cost-plus-a-fixed-fee contractor is an instrumentality of the United States. One who contracts with the Government on that basis is engaged under the strictest form of control and supervision and at no risk to himself, when operating within the provisions of the contract, to render services for the United States. He is reimbursed for every item of legitimate cost. The essence of the transaction is that for an agreed fee the Government employs his technical, managerial and organizational abilities. The Congress in authorizing the Secretary of War to operate and maintain adequate military facilities for national defense purposes directed him to do so "either by means of Government personnel or through the *agency* of selected, qualified commercial manufacturers under contracts entered into with them." (Emphasis supplied). The use of the term "agency" by the Congress was by design and not by accident. The Secretary of War was already empowered to make purchases in the open market from the normal sources of supply. To avoid the evils of a "cost-plus" contract and to restrict the imposition of unnecessary costs upon the Government, the Secretary of War determined to enter into a new type of contractual relationship in which the Secretary of War or his duly authorized representatives should exercise continuous and complete control over the activities of the operating contractor. The record in this case, and particularly the copy of the operating contract herein, reflects the extent of that control. Clearly the Government officers had the power of absolute control

\* Act of July 2, 1940, (Public No. 703, 76th Cong.) 54 Stat. 712, 50 U.S.C. App. Sec. 1171.

over all the details of performance. It is not necessary to determine that the contractor in this case was an agent of the Government for all purposes, but it is sufficiently clear that the contractor here in the manufacture of munitions of war was acting for and on behalf of the United States in its sovereign capacity. As such, it was an instrumentality of the United States and enjoyed the sovereign immunity which the United States of America, acting in its governmental capacity, as contrasted with its proprietary capacity, enjoys from all regulatory statutes and from which it is expressly excluded in the Fair Labor Standards Act.

From its inherent nature, the United States of America, as the sovereign, must of necessity operate through agents. "Departments" are the sole form of agency mentioned in the Constitution<sup>4</sup> and were almost the sole form of agency created by Congress prior to the movement for the establishment of "independent" agencies. For more than 100 years, however, corporations have been used as agencies for doing the work of the Government. Congress may create them "as appropriate means of executing the powers of government." *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 389. It would serve no useful purpose to catalog all of the different judicially recognized instrumentalities or agencies of the United States of America.<sup>5</sup> This much is clear—there is no difference in the effective control of a corporation, whether it be by stock ownership or by the

<sup>4</sup> U.S. Const., Art. II, Sec. 2.

<sup>5</sup> The following have been held to be instrumentalities of the United States, although their organization and ownership have varied: The Panama Railroad Co., *New York ex rel Rogers v. Graves*, 299 U.S. 401; The Tennessee Valley Authority, *Pierce v. U.S.*, 314 U.S. 306; The United States Shipping Board Emergency Fleet Corp., *Sloan Shipyards v. U.S. Fleet Corp.*, 258 U.S. 549; Home Owners' Loan Corp., *Pittman v. Home Owners' Corp.*, 308 U.S. 21; Army Post Exchanges, *Standard Oil Co. of California v. Johnson*, 316 U.S. 481.



provisions of a contract, in determining whether such corporation is an instrumentality of the United States.

The case of *Alabama v. King & Boozer*, 314 U.S. 1, is sometimes cited for the proposition that a cost-plus-a-fixed-fee contractor is not an instrumentality of the United States of America and therefore does not enjoy sovereign immunity. Such reliance arises from an obvious misunderstanding of the decision in that case. All that was decided there was that a state tax imposed upon a vendor might be passed on to the purchaser in connection with contracts of sale made in its own name by a cost-plus-a-fixed-fee contractor engaged in constructing a War Department facility. This case is merely another decision in the long line of cases which attempt to determine when a state can and when it cannot tax an instrumentality of the federal Government. This Court has recently said that such "line of taxability is somewhat irregular and has varied through the years." *S.R.A. Inc. v. Minnesota*, 327 U.S. 558, 562.

The Court did not say in *Alabama v. King & Boozer*, *supra*, that a cost-plus-a-fixed-fee contractor was not an instrumentality of the federal Government, and language to this effect can be found nowhere in the opinion. What the Court did say was "but however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit." (Emphasis supplied). It is a normal practice to restrict the authority of an agent to the end that he cannot pledge his principal's credit. This Court has recognized that its decision in *Alabama v. King & Boozer* was limited to the question of immunity from state taxation to the specific facts before it. *United States v. Allegheny County*, 322 U.S. 174.

In his memorandum requesting that certiorari be granted herein, the Solicitor General has designated the Respondent as an "independent contractor." Even if the Respondent

were designated as an "independent contractor" by the terms of the operating contract in effect at Louisiana Ordnance Plant, such designation does not determine the issue. This Court has recently held that "putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722. In so holding, the Court has rightly determined that the relationship does not depend upon isolated factors but rather upon the circumstances of the whole activity. Cf. *N.L.R.B. v. Hearst Publications*, 322 U.S. 111. Certainly this rule works both ways. If a worker can show that he is an employee rather than an independent contractor, then an alleged employer has the same right to show that he is an agent or instrumentality of the Government rather than an independent contractor, as he is sometimes labeled by his contract with the Government, for the purposes of avoiding the Fair Labor Standards Act.

From "the circumstances of the whole activity", it appears clear that the cost-plus-a-fixed-fee contractor herein was acting as an instrumentality of the United States of America in the manufacture of munitions of war at Louisiana Ordnance Plant. By express terms the United States is excluded from the definition of "employer" as defined by Section 3(d) of the Act. Such exclusion would, of course, include any agency or instrumentality of the United States. One court in analyzing comparable situations has urged that there is no reason why the United States and its employees should not be subject to the provisions of the Fair Labor Standards Act.\* Such observation ignores the plain language of the Act. The United States Government and its employees were expressly excluded from the regulatory provisions of the Fair Labor Standards Act for the reason that the federal Government has full control of the hours of work, the rates of pay, and the working conditions of its employees and it needs no

\* *Bell v. Porter*, 159 F.(2d) 117, 119 (C.C.A. 7th)

general legislative mandate to observe fair labor standards. By contract provisions it can exercise the same control over those persons who contract with it.

To hold that the cost-plus-a-fixed-fee contractor in the case at bar was an instrumentality of the United States and, as such, excluded from the provisions of the Fair Labor Standards Act, it is not necessary to determine that the employees of the contractor are employees of the Government for all purposes. This Court has recently said that "the question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the federal Government for every purpose which might be conceived, but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of Governmental employer and employee." *United States v. United Mine Workers of America*, 330 U.S. 258. The employees involved in the *United Mine Workers* case were originally employees of the private owners of the mines which had been seized by the Government under the War Labor Disputes Act. The Government permitted and required the mine managers to continue the operation and in nearly every respect there was no variation in the manner of operating the mines before and after the seizure by the Government. If the employees of private contractors become employees of the federal Government for the purposes of the War Labor Disputes Act upon seizure of the mines by the Government, then employees of a cost-plus-a-fixed-fee contractor operating a Government-owned Ordnance facility under the broad power of control of the United States are employees of the United States to the extent that they are not covered by the provisions of the Fair Labor Standards Act.

The Government regulated the hours of work and the rates of pay of such employees, it had the authority to fire them, and it paid their wages and salaries indirectly through the instrumentality of the cost-plus-a-fixed-fee



contractor. The only factor lacking in this employer-employee relationship was that the employee's name did not appear directly on the Government payrolls. This Court has recognized that employees need not be directly employed by the United States or any state or political subdivision of a state to exclude them from the coverage of the Fair Labor Standards Act. Cf. *Creekmore v. Public Belt R.R.*, 134 F.(2d) 576 (C.C.A. 5th); Certiorari denied, 320 U.S. 742.

The control which the United States reserved and exercised over the operation of Louisiana Ordnance Plant effectively made the cost-plus-a-fixed-fee contractor herein an instrumentality of the United States in the manufacture of munitions of war. As such instrumentality, the cost-plus-a-fixed-fee contractor was excluded from the regulatory provisions of the Fair Labor Standards Act and its employees were not covered by the Act.

### III.

THE MUNITIONS OF WAR PROCESSED AT LOUISIANA ORDNANCE PLANT WERE NOT "GOODS" WITHIN THE MEANING OF SECTION 3(i) OF THE FAIR LABOR STANDARDS ACT.

The Fair Labor Standards Act is concerned with goods which are articles or subjects of commerce and which are in the stream of commerce and not in the hands of the ultimate consumer thereof. Section 3(i) of the Act defines goods as follows:

" 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof. "

<sup>1</sup> 52 Stat. 1060, 29 U.S.C., Sec. 203 (1).



It is earnestly submitted that the "shells, grenades, mines, fuses and bombs and other products" which were processed at Louisiana Ordnance Plant were not "articles or subjects of commerce" within the meaning of "goods" as defined in the Fair Labor Standards Act. They normally have no commercial value or market since they serve no commercial function. It is unlawful to export such materials without a license.\* As the Court below aptly pointed out, these munitions "never at any time went into or became a part of commerce as defined in the Fair Labor Standards Act. They were not manufactured for sale; nor were they ever intended or used for commercial purposes". 164 F.(2d) 1016, at 1017. In so holding the Circuit Court has pointed up the realities of the situation for there were no goods produced at Louisiana Ordnance Plant as Congress intended the term "goods" to include in enacting the Fair Labor Standards Act.

Apart from the fact that the shells, grenades, mines, fuses and bombs lack the essential characteristics of "goods" as that term is defined by the Act, neither the Petitioners nor the Respondent in this case were engaged in the production of goods for commerce because of the exclusionary clause contained in the definition of "goods". Section 3(i) does not include goods "after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." There can be no serious dispute that the United States was the ultimate consumer of the munitions of war dealt with at Louisiana Ordnance Plant. During all the times when the contractor had anything to do with these munitions of war, they were in the actual physical possession of the United States. The operating contract provided that the title to all materials should vest in

\* Act of November 4, 1939, c. 2, Sec. 12, 54 Stat. 10, as amended January 26, 1942, c. 19, 56 Stat. 1922 U.S.C. 452; July 26, 1947, c. 343, Title II, Sec. 205(a), 61 Stat.—, Presidential Proclamation 2776 of March 27, 1948, 13 F. R. 1623.

the United States upon the arrival at the plant site or at some approved place off the plant site as determined by the Contracting Officer's Representative. Much of the materials were furnished to the Louisiana Ordnance Plant by the United States as government, or "free issue," materials. The Contracting Officer's Representative had the full custody, control and responsibility of all material, equipment or other property on the plant site. The contractor in this case had no dealings with the munitions of war or their essential ingredients or component parts until after such materials and component parts had come into the actual physical possession of the United States of America. There is a sharp distinction here from the normal situation where a war contractor might procure his raw materials from any source, fabricate his goods and then sell and deliver them to the United States. In the instant case, the cost-plus-a-fixed-fee contractor was solely performing services with respect to material already in the hands of the ultimate consumer. The Court below was correct in its conclusion when it said:

"On the other hand, if the defendant was not an agency or instrumentality of the United States, and if the munitions were articles of commerce within the contemplation of the Act, and if the United States was not the producer of the munitions, and if the subparagraph (d) of Sec. 3 of the Act, excluding the United States from its operation, is not applicable; then there would seem to be no escape from the conclusion that since the finished products and all their ingredients are the property of the United States and delivered to it as the ultimate consumer of the goods, the Act, under subparagraph (i) of Sec. 3, would still be inapplicable because the term 'goods' 'does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof.'"

The Second Circuit Court of Appeals has reached the same conclusion in a substantially similar situation. *Divins v. Hazeltine Electronics Corp.*, 163 F.(2d) 100, at 104 (C.C.A. 2d).

Since the shells, grenades, mines, fuses, bombs and other products dealt in at Louisiana Ordnance Plant were not "goods" within the definition of the Fair Labor Standards Act, then neither the Petitioners nor the Respondent were engaged in the production of goods for commerce in the operation of that facility.

#### CONCLUSION

The judgment of the Circuit Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,  
J. R. L. JOHNSON, JR.  
ROBERT A. FULWILER, JR.  
Counsel

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1947

HARRIS KENNEDY, ET AL. \_\_\_\_\_ *Petitioners,*

No. 590

SILAS MASON COMPANY \_\_\_\_\_ *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

BRIEF AMICI CURIAE

GROVER T. OWENS,

E. L. McHANEY, JR.,

JOHN M. LOFTON, JR.,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947

HARRIS KENNEDY, ET AL. \_\_\_\_\_ *Petitioners;*

No. 590

SILAS MASON COMPANY \_\_\_\_\_ *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

BRIEF AMICI CURIAE

OPINIONS BELOW

Opinions of the District Judge appear in 70 F. Supp. 929, and 68 F. Supp. 576. Opinion of the Circuit Court of Appeals appears in 164 F. (2) 1016.

JURISDICTION

Certiorari to the Circuit Court of Appeals for the Fifth Circuit was granted March 8, 1948, \_\_\_\_\_ U. S. \_\_\_\_\_ L. Ed. \_\_\_\_\_

PRELIMINARY STATEMENT

The Arkansas Ordnance Plant at Jacksonville, Arkansas, was an ordnance facility built and operated during the war for the purpose of producing artillery fuses, boosters, primers, detonators, and other war munitions. Its construction and operations were effected by the Government through the agency of Ford, Bacon & Davis, Inc., a cost-plus-a-fixed-fee contractor, pursuant to authorization con-

tained in the following laws: The Act of July 2, 1940 (Public No. 703, 76th Congress); the Act of March 11, 1941 (Public No. 11, 77th Congress), and the Act of June 30, 1941 (Public No. 139, 77th Congress).

The attorneys whose names appear on this brief are defending the claims of several thousand former employees at the Arkansas Ordnance Plant who seek additional compensation under the provisions of the Fair Labor Standards Act. Because this case presents important questions of law that may be conclusive in the cases mentioned above, the undersigned, with consent of counsel for the parties, and with leave of court, submit this brief *amici curiae*.

## SUMMARY OF THE ARGUMENT

### I

#### EMPLOYEES AT ORDNANCE FACILITIES ARE EMPLOYEES OF THE UNITED STATES

Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. 201-219.

*United States v. Driscoll*, 96 U. S. 421, 24 L. Ed. 847 (1878).

*Alabama v. King & Boozer*, 314 U. S. 1, 86 L. Ed. 3 (1941).

*James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155 (1937).

*John L. Lewis v. United States*, \_\_\_\_\_ U. S. \_\_\_\_\_, 91 L. Ed. 595 (1947).

*National Labor Relations Board v. Atkins & Company*, 331 U. S. 398, \_\_\_\_\_, 91 L. Ed. 1157, 1165 (1947).

Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U. S. C. A. App. § 1171.

*Hirabayashi v. United States*, 320 U. S. 81, 93, 87 L. Ed. 1774, 1782 (1943).

*Arver v. United States*, 245 U. S. 366, 62 L. Ed. 349 (1917).



*United States v. Bethlehem Steel Corporation*, 315 U. S. 289, 305, 86 L. Ed. 855, 866 (1942).

*Stewart v. Kaiser Co., Inc.*, 71 F. Supp. 551 (D. C., Oreg., 1947).

*Bowles v. Wallingham*, 321 U. S. 503, 519, 88 L. Ed. 892, 905 (1944).

*Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. Ed. 440 (1889).

*Rutherford Food Corporation v. McComb*, 331 U. S. 722, 91 L. Ed. 1350 (1947).

*McComb v. McKay*, ..... F. (2) ..... C. C. H. 13 Labor Cases ¶ 64,113 (C. C. A. 8, 1947).

*Inland Waterways Corporation v. Young*, 309 U. S. 517, 523, 84 L. Ed. 901, 906 (1940).

*Cherry Cotton Mills v. United States*, 327 U. S. 536, 539, 90 L. Ed. 835, 838 (1946).

*Keiser v. Reconstruction Finance Corporation*, 306 U. S. 381, 390, 83 L. Ed. 784, 789 (1939).

## II

### EMPLOYEES AT GOVERNMENT-OWNED ORD- NANCE FACILITIES ARE NOT ENGAGED IN PRODUCTION OF MUNITIONS FOR COMMERCE.

*Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E. D., Ark., 1947).

*H. B. Deal & Co., Inc. v. Leonard*, 210 Ark. 512, 196 S. W. (2) 901 (1947).

*National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2) 780 (C. C. A. 9, 1940).

*Fox et al. v. Summit King Mines, Limited*, 143 F. (2) 926 (C. C. A. 9, 1944).

*Walling v. Haile Gold Mines, Inc.*, 136 F. (2) 102 (C. C. A. 4, 1943).

*Holland v. Haile Gold Mines, Inc.*, 44 F. Supp. 641 (1942).

*Ritch v. Puget Sound Bridge & Dredging Co., et al.*, 156 F. (2), 334, (C. C. A. 9, 1946).

*Ritch v. Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W. D., Wash., 1945).

*Clyde v. Broderick et al.*, 144 F. (2) 348 (C. C. A. 10, 1944).

*Clyde v. Broderick*, 52 F. Supp. 533 (D. C., D. Col., 1943).

*Crabb v. Welden Brothers*, 164 F. (2) 797 (C. C. A. 8, 1947).

*Divins v. Hazeltine Electronics Corp.*, 163 F. (2) 100 (C. C. A. 2, 1947).

*New York ex rel. Rogers v. Graves*, 299 U. S. 401, 406, 81 L. Ed. 306, 309 (1937).

*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688 (1936).

*Carter v. Carter Coal Co.*, 239 U. S. 238, 239, 80 L. Ed. 1160, 1182 (1936).

*United States v. Darby*, 312 U. S. 100, 85 L. Ed. 609 (1941).

*Young v. Kellex Corporation*, \_\_\_\_ F. Supp. \_\_\_\_, C. C. H. 14 Labor Cases ¶ 64,244 (E. D., Tenn., 1948).

### III

**MUNITIONS PRODUCED AT GOVERNMENT-OWNED  
ORDNANCE FACILITIES ARE NOT GOODS AS  
DEFINED IN THE FAIR LABOR STANDARDS  
ACT.**

*Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, 693 (E. D., Ark., 1947).

*Anderson v. Federal Cartridge Corporation*, 72 F. Supp. 644 (D. Minn., 1947).

*Kruger v. Los Angeles Shipbuilding and Drydock Corporation*, \_\_\_\_ F. Supp. \_\_\_\_, C. C. H. 12 Labor Cases ¶ 63,660 (S. D., Calif., 1947).

*Lynch v. Embry-Riddle Co.*, ..... F. Supp. ....,  
C. C. H. 10 Labor Cases ¶ 62,923 (S. D., Fla.,  
1945).

*Divins v. Hazeltine Electronics Corporation*, 163  
F. (2) 100 (C. C. A. 2, 1947).

*Crabb v. Welden Brothers*, 164 F. (2) 797 (C. C. A.  
8, 1947).

*Bell v. Porter*, 159 F. (2) 117 (C. C. A. 7, 1946).

*Waco v. Jackson*, 13 Pet. 498, 10 L. Ed. 264 (1839).

*United States v. Clarke*, 20 Wall. 92, 22 L. Ed. 320,  
323 (1874).

## A R G U M E N T

### I.

#### EMPLOYEES AT ORDNANCE FACILITIES ARE EMPLOYEES OF THE UNITED STATES.

The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. 201-219, was never intended to apply to the Government of the United States or to its employees. If this is not clear from the declaration of policy set forth in Section 2 of the Act, all doubt is removed by the express provision of Section 3(d), to the effect that the term "employer" shall not include the United States.

A primary question, therefore, is whether the petitioners, for purposes of the Fair Labor Standards Act, are employees of the United States. The lower courts, generally speaking, have failed to pass upon this issue, either because it was not raised by the pleadings or because its decision was unnecessary. As a general rule, those courts whose decisions have favored the position of respondent have based their decisions upon the ground that employees at ordnance facilities were not engaged in the production of goods for commerce. Under such findings the employment issue becomes moot.

Those courts which have sustained the employee's right of action under the Fair Labor Standards Act have held (if the issue was mentioned in their opinions) that the claimants were not employees of the Government on the authority of *United States v. Driscoll*, 96 U. S. 421, 24 L. Ed. 847 (1878) and *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. Ed. 3 (1941). An examination of these cases and of subsequent decisions of this court demonstrates that the employee defense may not be summarily dismissed. We believe that recent opinions of this court, notably that in *Lewis v. United States*, \_\_\_\_\_ U. S. \_\_\_\_\_, 91 L. Ed. 595, require that this defense be sustained.

The facts of the Driscoll case show that it is not controlling. There, the Government contracted to purchase granite from Ordway, the owner and operator of certain quarries in Virginia. The contract price was the cost of production, plus 15 per cent. Penalties were prescribed for failure to deliver in accordance with the contract. The



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plaintiff, Driscoll, an employee at the quarries, sued the United States in the Court of Claims for wages earned and not paid. This court held that there was no privity between the plaintiff and the United States, and that Ordway employed the plaintiff and alone was required to pay him. The court said:

"The United States had no interest in the rate or amount paid, save that the sum so paid, with fifteen *per centum* in addition, was the measure of the amount to be paid to Ordway.

• • • • •  
"The mode, manner, and rate of Ordway's compensation was a matter between him and the United States, and was one with which the appellee had nothing to do."

In the case at bar, the Government was interested in the rates or amounts paid to employees. It reserved the right and exercised the right to fix the rates of compensation of these employees (R. 51, 52). The contractor was not allowed to deviate from the rates so fixed (See App., O. P. I. 9, 107.1). The Government reserved the right and exercised the right to approve or disapprove the hiring and firing of employees, and to approve or disapprove any changes in their rates of pay or classifications. It furnished the work and determined the number of persons to be employed. The work was performed in a Government-owned plant, with Government tools and machines, with Government materials, and with Government financing. The contractor undertook no financial risk in the enterprise. It was a Government project throughout. The contractor, for a fixed fee, merely furnished management service to the Government. Its fee was not dependent on the amount of money spent or the quantity of munitions produced. There was no penalty prescribed for subnormal production, either as to quantity or quality. If materials were ruined the contractor did not bear the cost of such materials. The Government undertook responsibility for all costs of every kind. It specified the materials to be produced and dictated the manufacturing processes to be used in their production.

The Louisiana Ordnance Plant was a Government-owned, Government-financed war project. The contractor-operator merely furnished supervision and management to the Government. Such contractors have been described as bookkeeping devices and as corporate foremen. No purchase or sale of materials was involved. Title to and possession of the materials, work in progress, and completed items were always in the Government. The Driscoll case merely involved the purchase of materials by the Government from a private producer, the purchase price having been calculated on a cost-of-production basis. It is therefore submitted that the Driscoll case is not controlling on the issue here.

Neither is the case of *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. Ed. 3 (1941), controlling. That case involved the constitutional right of a state to impose a sales tax on purchases by a cost-plus-a-fixed-fee construction contractor. The decision there was a logical extension of the principles announced in *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155 (1937). The case stands for the principle that a tax levied on a Government contractor and measured by his purchases is not discriminatory and not unconstitutional on the ground that it is a tax against the United States. This court stated in its opinion that the contractor was not an agent of the United States in the sense that it could bind the United States for the purchase of materials or otherwise pledge the Government's credit. Even an admitted agent cannot go so far in the absence of express authority.

This is not to say, however, that employees at the Louisiana Ordnance Plant, for purposes of the Fair Labor Standards Act, are not to be deemed employees of the United States.

In enacting the Fair Labor Standards Act the Congress did not intend to regulate wages or hours of employees for whom the Government was responsible. The act is justified under the commerce clause of the Constitution and it applies to industries engaged in commerce or in the production of goods for commerce. The Government can pay such wages as it desires to employees for whom it may be responsible. It is presumed to pay a fair and living wage. At any

rate, an act to increase and regulate wages to such employees need not be based upon the commerce clause of the Constitution.

At ordnance facilities the Government dictated the wages paid—not only the basic hourly rate, but the weekly total. It determined whether and in what amount overtime should be paid. It determined whether an employee should be paid by the hour or by the week. The contractor had no discretion and could pay only such amounts as were approved by the Government.

Section 15 of the Fair Labor Standards Act makes it unlawful for any person "to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title". Has the Government, the Secretary of War, the Chief of Ordnance, or any subordinate employee of the Government violated Section 15? The Government not only knew what wages were paid—it dictated their payment. Is the Silas Mason Company liable criminally under Section 15, even though it explicitly followed the instructions of the Government? An affirmative answer, logically would seem to follow any ruling in favor of the petitioners in this case.

In the case of *John L. Lewis v. United States*, \_\_\_\_\_ U. S. \_\_\_\_\_, 91 L. Ed. 595 (1947), this court held that employees in the coal mines seized by the Government under the authority of the War Labor Disputes Act (57 Stat. 163, c. 144, 50 U. S. C. A. App. §§ 1501-1511) were employees of the Government. The case is so clearly in point with the issue in the case at bar that we take the liberty of quoting extensively from the opinion of the court delivered by Mr. Chief Justice Vinson:

"Congress intended that by virtue of Government seizure, a mine should become, for purposes of production and operation, a Government facility in as complete a sense as if the Government held full title and ownership. . . . The question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the federal

Government for every purpose which might be conceived, but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee.

“The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority.

• • • The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control.

“The defendants also point to the regulations which provide that none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government, that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit. The regulations on which defendants rely represent an attempt on the part of the Coal Mines Administrator to define the respective powers and obligations of the Government and private operators during the period of Government control. We do not at this time express any opinion as to the validity of these regulations. It is sufficient to state that, in any event, the matters to which they refer have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers.

“We do not find convincing the contention of the defendants that in seizing and operating the coal mines the Government was not exercising a sovereign function, and that, hence, this is not a situation which can be excluded from the terms of the Norris-LaGuardia Act. • • • Under the conditions found by the President to exist, it would be difficult to conceive of a more vital and urgent function of the Government than the seizure and operation of the bituminous coal mines. We



hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply."

The separate opinion of Mr. Justice Black and Mr. Justice Douglas contains the following statement:

"We have no doubt that the miners became Government employees when the Government took over the mines. It assumed complete control over the mines and their operation. The fact that it utilized the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves."

The case at bar presents a much stronger case to establish the Government-employee relationship than did the Lewis case. Here, the facility was a Government facility in a complete sense, as the Government actually had full title and ownership, as well as possession. Here, also, the Government retained not only ultimate control, but immediate and actual control. Representatives of the Army had complete command of the reservation comprising the plant. (Appx., U. S. P. I. 50,002.1 and 57,100.3). The Silas Mason Company was hired by the Government to manage its own plant and was required to carry out all Government instructions.

In the Lewis case, the contention that, because the mine operators stood the risk of profit or loss from operation of the seized mines, the employees were employees of the owners was made and overruled. It is clear in the case at bar that all risk of operation was upon the Government. So, too, in the case at bar the operation of the plant was admittedly a sovereign function, duly authorized under the war powers of the Federal Government.

It thus appears that all of the elements present in the Lewis case are present here. Also present in the case at bar are those important elements mentioned in the case of

*National Labor Relations Board v. Atkins & Company*, 331 U. S. 398, 91 L. Ed. 1157, 1165 (1947). This court there said:

"That relationship (employer-employee) may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker."

The Louisiana Ordnance Plant and other similar ordnance plants were operated under the authority of the Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U. S. C. A. App. § 1171. That act authorizes the Secretary of War to provide for the operation of Government-owned plants "either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them". In many plants the management services of contractors such as the Silas Mason Company were utilized. In other plants, such as the Pine Bluff Arsenal, at Pine Bluff, Arkansas, the Secretary of War deemed private management services unnecessary.

It is submitted that, regardless of how management is provided, the one plant is as much a Government undertaking as the other, and that the right to relief under Section 16 (b) of the Fair Labor Standards Act cannot be made to depend upon the technical question of who delivers the pay check to the employee. Yet, a decision affirming petitioners' right to relief under the Fair Labor Standards Act will result in just such a distinction, as, admittedly, Section 3 (d) of the act would bar any recovery by an employee at the Pine Bluff Arsenal or at other plants similarly operated.

The war powers of the Federal Government extend to every matter and activity "so related to war as substantially to affect its conduct and progress". *Hirabayashi v. United States*, 320 U. S. 81, 93, 87 L. Ed. 1774, 1782 (1943). Under this authority Congress can draft men for battle service. *Arver v. United States*, 245 U. S. 366, 62 L. Ed. 349 (1917). Its power to draft business organizations and labor to support the fighting men who risk their

lives can be no less. *United States v. Bethlehem Steel Corporation*, 315 U. S. 289, 305, 86 L. Ed. 855, 866 (1942). The Congress, by drafting petitioners for war work, could have required their services in war plants on terms less favorable than they actually received. *Stewart v. Kaiser, Co., Inc.*, 71 F. Supp. 551 (D. C., Oreg., 1947).

Does the fact that Congress did not draft petitioners as millions were drafted for military service place the Government in a position less favorable with respect to their claims for additional wages? The Government, by executive action, fixed the wages of these petitioners. Does the mere fact that payment of the wages so fixed was effected through a contractor instead of through a Government finance officer render the Government liable to be mulct for additional billions in wages and penalties? There is no contention in this case that wages actually paid to petitioners were substandard or unfair. These men were well-paid for their services and many escaped military duty by virtue of their employment.

In *Bowles v. Willingham*, 321 U. S. 503, 519, 88 L. Ed. 892, 905 (1944), this court said:

"A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property."

By the same token, we submit, the nation is not required to pay employees in Government-owned war facilities on the same basis as private employers are required to pay their employees.

We earnestly urge that, for purposes of the Fair Labor Standards Act, these petitioners should be regarded as Government employees. The common law tests of the employer-employee relationship are fully met.

— *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. Ed. 440 (1889);

*Rutherford Food Corporation v. McComb*, 331 U. S. 722, 91 L. Ed. 1350 (1947);

*McComb v. McKay*, ..... F. (2) ....., C. C. H. 13 Labor Cases ¶ 64,113 (C. C. A. 8, 1947).



These petitioners possess many more characteristics of a Government employee than do miners in seized coal mines or employees in seized factories. How could the possession and control of the Government have been more complete? It owned the plant and the materials and financed the project. It had the only proprietary interest. It alone had capital risk.

Of interest in this connection, although not directly in point, is *Inland Waterways Corporation v. Young*, 309 U. S. 517, 523, 84 L. Ed. 901, 906 (1940). The question at issue was whether a national bank could legally give security for funds deposited by the Waterways Corporation (wholly owned by the United States) under an act authorizing pledges to secure public moneys. In holding the pledges valid this court said:

"So far as the powers of a national bank to pledge its assets are concerned, the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of ultra vires. Compare *United States ex rel. Skinner & E. Corp. v. McCarl*, 275 U. S. 1, 8, 72 L. Ed. 131, 135, 48 S. Ct. 12. The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County v. United States*, 263 U. S. 341, 68 L. Ed. 328, 44 S. Ct. 121; *Emergency Fleet Corp. v. United States Shipping Bd.* *v. Western U. Teleg. Co.*, 275 U. S. 415, 72 L. Ed. 345, 48 S. Ct. 198. The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. Compare *United States Grain Corp. v. Phillips*, 261 U. S. 106, 113, 67 L. Ed. 552, 555, 43 S. Ct. 283.

✓ In *Cherry Cotton Mills v. United States*, 327 U. S. 536, 539, 90 L. Ed. 835, 838 (1946), the Government was permitted to plead as a counterclaim the debt owing by the



petitioner to the Reconstruction Finance Corporation. The latter corporation was characterized as follows:

"Its Directors are appointed by the President and affirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits if any go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes."

The advantages enjoyed by circumventing conventional executive agencies in the accomplishment of purely Governmental functions have induced the Government to an increasing extent to make use of independent corporate facilities. For a list of corporations carrying on purely Governmental activities, see footnote 3 in *Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 390, 83 L. Ed. 784, 789 (1939).

The fact that Silas Mason Company was not wholly owned by the Government does not affect the situation. That the Secretary of War, by Congressional authority, chose to retain respondent to manage one of the Government's war plants does not in the least change the characteristics of that plant so as to make a private enterprise of what was purely a Governmental undertaking. Respondent was merely the agency selected by the Government to accomplish purely Governmental purposes. As indicative of the relationship between the Government and the respondent, we have set forth in an appendix brief extracts from the Ordnance Procurement Instructions, a compilation of instructions issued by the Department of Ordnance, pursuant to authority conferred by the Secretary of War for the use and guidance of Ordnance Procurement officers such as the contracting officer in charge of the Louisiana Ordnance Plant.

We submit that the petitioners were, for purposes of this case, employees of the Government and therefore are foreclosed from maintaining suit under the Fair Labor Standards Act.

## II

# EMPLOYEES AT GOVERNMENT-OWNED ORDNANCE FACILITIES ARE NOT ENGAGED IN PRODUCTION OF MUNITIONS FOR COMMERCE.

Petitioners base their case solely on the ground that they were engaged in the production of goods for commerce. They make no claim that they were engaged in commerce.

Many District Courts and several of the Circuit Courts of Appeal have passed upon this issue, either directly or inferentially.

The question, simply stated, is whether a shipment by the United States in its sovereign capacity of its own property across state lines for defense of the nation in time of war constitutes commerce.

As pointed out by District Judge Lemley in his exhaustive opinion in the case of *Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E. D., Ark. 1947), the question has been answered in the negative in the following cases: *H. B. Deal & Co., Inc., v. Leonard*, 210 Ark. 512, 196 S. W. (2) 991 (1947); *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2) 780 (C. C. A. 9, 1940); *Fox, et al., v. Summit King Mines, Limited*, 143 F. (2) 926 (C. C. A. 9, 1944); *Walling v. Haile Gold Mines, Inc.*, 136 F. (2) (C. C. A. 4, 1943), when read in connection with the opinion of the District Court in *Holland v. Haile Gold Mines, Inc.*, 44 F. Supp. 641 (1942); *Ritch v. Puget Sound Bridge & Dredging Co., et al.*, 156 F. (2) 334, (C. C. A. 9, 1946), when read in connection with *Ritch v. Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W. D., Wash., 1945); *Clyde v. Broderick et al.*, 144 F. (2) 348 (C. C. A. 10, 1944), in connection with *Clyde v. Broderick*, 52 F. Supp. 533 (D. C., D. Col., 1943). Later decisions to the same effect are *Crabb v. Welden Brothers*, 164 F. (2) 797 (C. C. A. 8, 1947), *Drains v. Hazeltine Electronics Corp.*, 163 F. (2) 100 (C. C. A. 2, 1947), and that of the Fifth Circuit in the case at bar. It is thus seen that the proposition that such shipments are not commerce finds either direct or inferential support in decisions by the Supreme Court of Arkansas and by the

Circuit Courts of Appeal of the Second, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits.

The Government, in producing munitions for the armed forces, was not producing goods for commerce. It was exercising the power "to raise and support Armies" conferred by Article I, Section 8, of the Constitution. This was as much a part of the national defense as was the recruiting and transporting of an army overseas. Both powers arise under the same constitutional provision. Production of component parts by the Government in this country for delivery overseas was no more for commerce than final assembly and timing of a bomb in England by the military for delivery in Berlin.

There can be no doubt that production at the Louisiana Ordnance Plant was by the Government and for the Government, irrespective of whether the personnel doing the actual work were Government employees or employees of an independent contractor. Clearly, the Government was the producer of the munitions. Therefore, if the Government was not producing for commerce, it logically follows that petitioners were not producing for commerce.

Previous decisions of this court make it clear that production of munitions by the Government for war purposes is not production for commerce, and the transportation thereof by the Government across state lines and into foreign countries is not commerce as that term is used in the Constitution or in the Fair Labor Standards Act. To this effect is the case of *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 406, 81 L. Ed. 306, 309 (1937), wherein it was held that the Federal Government, by shipping merchandise in the exercise of its sovereign functions, is not engaged in commerce, even though the Government incidentally in connection with its Governmental functions commercially transported merchandise for others. The case involved the question whether the salary of Rogers, as general counsel for the Panama Railroad Company, was subject to state taxation. The railroad was incorporated under the laws of New York. Coincident with acquisition of the Panama Canal Zone in 1904, the Government purchased all of the stock of the railroad company. The company operated a railroad across the Isthmus and a dairy

and two hotels in connection therewith, and a line of steamships between New York and the Canal Zone. During the construction of the canal the railroad was almost exclusively employed as an adjunct of such construction, although it was incidentally used for commercial transportation. After completion of the canal, the use of the railroad, chiefly as an adjunct to the management and operation of the canal, was continued. In holding that the railroad exercised functions of a Governmental character and not of a commercial character, this court said:

"That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt.

"The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation. *Luxton v. North River Bridge Co.*, *supra*, pp. 533, 534; *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 9, 10, 24 L. Ed. 708, 710; cf. *Carter v. Carter Coal Co.*, 298 U. S. 238, 297, 80 L. Ed. 1160, 1181, 56 S. Ct. 855. In recognition of the principle established by these and other decisions, this court in *Wilson v. Shaw*, 204 U. S. 24, 33, 51 L. Ed. 351, 356, 27 S. Ct. 233, sustained the acquisition, construction and maintenance of the canal as within the commerce power of the federal government.

"Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature and are themselves co-operating regulators—or, perhaps more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of



the interrelation of the railroad company's activities with the management and operation of the canal.

"Second. The power of the Federal Government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. The Panama Rail Road Company was acquired and has been utilized in virtue of that power."

In *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688 (1936), although recognizing that the Government cannot constitutionally engage in a commercial business, the court upheld the right of the Government to generate, sell, and distribute electric power made available by the construction of dams for flood control and navigation. Justifying the construction of the TVA improvements under both the war and regulation of commerce powers, the court said that the distribution of electric power thus created was not engaging in commerce, but merely was the disposition of surplus Government property. The court observed that should the Government undertake to mine gold, silver, or other minerals from the public domain it would not thereby be engaged in commerce in violation of the Constitution.

The Government, in its defense efforts, was engaged in war and not in commerce. In sending men and materials to foreign shores it was not engaging in commerce as that term is generally understood or as it is used in the Fair Labor Standards Act. The production of munitions for military use was as much a part of war as was the use of those munitions on the field of battle. The intervention of a private contractor, whether an independent one or otherwise, in the production processes does not alter the nature of the enterprise. The Government, had it elected to do so, could have used men in military uniform to man the machines at the Louisiana Ordnance Plant. The Government did, as a matter of fact, operate many of its own plants with Government-paid personnel.

We have never heard it contended that Government personnel in Government-owned arsenals were engaged in

the production of goods for commerce. Obviously, such plants are not engaged in production of goods for commerce within the intent of the Fair Labor Standards Act. By the same token, the employees at the Louisiana Ordnance Plant were not engaged in production of goods for commerce. The plant, the tools, equipment, and the raw materials were all owned by the Government. The production of the plant was Government property. Never for one moment was title to any products vested in anyone other than the Government. Does the operation become commerce or production for commerce merely because the Government sought assistance from a private agency in the operation of its own plant? There was no purchase or sale of munitions in this case. The Silas Mason Company merely furnished management to the Government for a fixed fee (See Appx., O. P. I. 9101.1). It was performing a service as distinguished from the selling of merchandise. The project was still a Governmental function. The Government was the producer, not the contractor.

When the Government operates its own plant it must of necessity employ one or more individuals to manage the plant so as to keep it operating. Management includes the responsibility of hiring and firing personnel. The fact that in the one instance employees are paid by the management and in the other by direct Government check is not a distinguishing factor. In each case the money originates in the same place—the public treasury. The important thing is that at all times during the processing of the materials title and possession are in the Government and that the completed items are produced and used for a Governmental purpose and not for commerce.

If it be admitted that the Government is not engaged in production for commerce when it produces munitions for the national defense at its own plants through its own employees without the intervention of a private contractor, then we submit that it follows as a necessary corollary that the Government was not engaged in production for commerce at the Louisiana Ordnance Plant. Both types of operation were authorized by the same act of Congress and were under the direct supervision of the Secretary of War.

However, should the manufacture of the munitions be considered as something apart from Government enterprise, still it was not production for commerce.

This court has consistently recognized the distinction between manufacture and commerce. The former is subject to regulation by Congress only in so far as it relates to the latter. *Carter v. Carter Coal Co.*, 239 U. S. 238, 239, 30 L. Ed. 1160, 1182 (1936). This distinction was recognized in *United States v. Darby*, 312 U. S. 100, 85 L. Ed. 609 (1941), wherein the constitutionality of the Fair Labor Standards Act was sustained. The wages and hours provisions of the act were justified only by virtue of the power of Congress to restrict commerce as an appropriate measure in its regulation.

In the *Carter Coal Co.* case, *supra*, the court said that commerce is the equivalent of "intercourse for the purposes of trade". The same thought was expressed in the *Darby* case, *supra*. We quote from the opinion at pages 115 and 122 of the official reports:

"The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, . . ."

. . . .

"The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair', as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce."

Therefore, assuming that petitioners and respondent were engaged in production, still their production was not for commerce. It was not for purposes of trade, as it was not for sale, barter, or exchange. Neither did it compete with other munitions in commerce. The munitions never entered commercial channels as that phrase is ordinarily understood and used. It was not the type of industry that Congress had in mind in enacting the act. It is not neces-

sary in this case to speculate on the applicability of the act had the munitions been manufactured and sold to the Government. In such a case trade in the commercial sense is involved.

In the case at bar no sale was ever made either before or after delivery. The fixed fee paid to the Silas Mason Company was in the nature of salary for services rendered, just as is a salary any proprietor pays to his servant or to the manager of his place of business. It was not payment for goods sold and delivered, but payment for services rendered.

District Judge Taylor, in *Young v. Kellex Corporation*, F. Supp. \_\_\_\_\_, C. C. H. 14 Labor Cases ¶ 64,244 (E. D., Tenn., 1948), made the following appropriate comment in a case involving the Atomic Bomb Plant at Oak Ridge, Tennessee:

"As near as a thing could be so made, the atomic bomb was produced by the United States as a government and a people. Its making was financed by the Government. Title to basic materials and finished product was at all times in the Government. From inception of the idea of producing a bomb to delivery of the bomb on its military objectives, there was unrelaxing supervision and direction by the Government. Though for reasons deemed sufficient to the Government, private corporations were employed in construction and production processes, the sovereign was always present as general owner, directing the work, directly or indirectly paying all bills, receiving the finished product into its exclusive custody. And though the atomic bomb moved across state lines, it entered into no commercial competition. It remained everywhere in Government custody and was everywhere impressed with the sovereign character, and never did it remotely become merchandise, as that term is understood in judicial decisions and in the commercial world."

It is respectfully submitted that the petitioners were not engaged in the production of goods for commerce, first, because transportation of the munitions was an administrative act of the sovereign authorized under its war powers,



and did not constitute transportation in commerce, and, second, because the munitions were not produced for sale or trade, did not enter commercial competition, and their production was, therefore, not for commerce as that term is used in the Fair Labor Standards Act.

### III

#### MUNITIONS PRODUCED AT GOVERNMENT-OWNED ORDNANCE FACILITIES ARE NOT GOODS AS DEFINED IN THE FAIR LABOR STANDARDS ACT.

To the casual observer this argument may appear colorable only. On reflection, however, its merit is obvious. The definition of "goods" in Section 3 (i) of the act shows conclusively that Congress was aiming only at goods or merchandise that entered channels of commerce or trade and not at such articles as are produced for the ultimate consumer from materials furnished by that consumer. It is clear from the act that the term "ultimate consumer" does not include one who incorporates the items produced into other items which themselves enter the channels of commerce.

The defense has been sustained in the following cases: *Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, 693 (E. D., Ark., 1947); *Anderson v. Federal Cartridge Corporation*, 72 F. Supp. 644 (D. Minn., 1947); *Kruger v. Los Angeles Shipbuilding and Drydock Corporation*, ..... F. Supp. ...., C. C. H. 12 Labor Cases ¶ 63,660 (S. D., Calif., 1947); *Lynch v. Embry-Riddle Co.*, ..... F. Supp. ...., C. C. H. 10 Labor Cases ¶ 62,923 (S. D., Fla., 1945); *Divins v. Hazeltine Electronics Corporation*, 163 F. (2) 100 (C. C. A. 2, 1947); *Crabb v. Welden Brothers*, 164 F. (2) 797 (C. C. A. 8, 1947) and by the Fifth Circuit in the case at bar. It thus appears that the Courts of Appeal for the Second, Fifth, and Eighth Circuits have approved the principle here urged. We are aware of no Federal appellate court decision to the contrary. The issue does not appear to have been presented in the case of *Bell v. Porter*, 159 F. (2) 117 (C. C. A. 7, 1946).

The Department of Labor in the court below in this case and in other cases has urged that the ultimate consumer exclusion of Section 3 (i) was intended solely to

protect the purchasing consumer from the application of Section 15 (a) (1). It stated that the exemption was intended to protect a private individual who carries personal articles produced in violation of the statute from one state to another. This is a strained interpretation of the ultimate consumer exclusion. The penalties of the act apply only to a wilful violator. Obviously, the ordinary private individual can have no personal knowledge of the wages paid or hours worked by employees of the manufacturer of an article, and the probability that such an individual might have such knowledge is too fantastic to suggest that Congress may have had such a situation in mind in adopting the exclusion clause.

The Department of Labor also urged that the exclusion was not applicable because, if it be assumed that the munitions being produced had already been delivered into the possession of the United States, then the United States became a producer, manufacturer, or processor thereof. But, if this be true, then the employees were employees of the United States and are excluded under Section 3 (d) of the statute.

Although the Administrator of the Wage and Hour Division has contended that an adoption of respondent's arguments would seriously embarrass the Administrator in administration of the act, he has never pointed out any situation wherein a judgment favorable to respondent would have any importance in the administration of the act, except in cases of Government-owned plants. The fears of the Administrator are wholly unfounded.

As has been heretofore mentioned, regardless of the outcome of this case, the Government, if it desires, can establish in the future any wage and hour regulations it desires for application to its own plants. Should it desire to pay overtime, it need not rely for authority on the Fair Labor Standards Act.

It is apparent that the Government did not desire to pay petitioners any additional compensation for past services, as, during the time the petitioners worked, their wages and hours were fixed by the Chief of Ordnance, who acted for the Secretary of War and the President. *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264 (1839); *United States*

v. *Clarke*, 20 Wall. 92, 22 L. Ed. 320, 323 (1874). This is further borne out by the fact that the President acting through the Secretary of War and the Chief of Ordnance instructed the contractor to defend these claims. If the Government desired to pay the claims here asserted, certainly it would not go through the mechanics of litigation, but would pursue the economical method of settlement without judicial intervention.

It is, therefore, submitted that the court should give effect to the plain terms of Section 3 (i) by declaring that the munitions upon which petitioners worked were not goods within the meaning of the Fair Labor Standards Act.

### CONCLUSION

In conclusion, we respectfully submit that the judgment of the Court of Appeals is correct and should be affirmed.

Three principal grounds have been urged in support of the judgment of the lower court. First, it is contended that under the Fair Labor Standards Act petitioners occupied the status of Government employees. Second, it is argued that the production of munitions under the circumstances of this case was not production for commerce because (a) the transportation of the munitions was an administrative act accomplished by the Government in aid of its war powers, and, therefore, was not transportation in commerce within the meaning of the Fair Labor Standards Act, and (b) the munitions were not produced for sale or trade, did not enter commercial competition, and, therefore, were not shipped in commerce. Third, it is urged that under the plain provisions of the act the munitions did not constitute "goods".

It is submitted that each of these supporting arguments is well taken, but attention is invited to the fact that if the respondent prevails on any one of these propositions the judgment should be affirmed.

Respectfully submitted,

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## APPENDIX

## EXCERPTS FROM ORDNANCE PROCUREMENT INSTRUCTIONS

50,001.1 New Ordnance Facility.—The term "New Ordnance Facility" means a Government-owned, contractor-operated plant under the jurisdiction of the Ordnance Department.

. . . . .

50,002.1 In the case of new Ordnance facilities and contractor-operated Field Service depots, the contracting officer's representative appointed by the contracting officer administering the operating contract will also be appointed the commanding officer of the station. Since the station is a Class IV installation under AR 170-10 as amended, he will be guided by the provisions of pertinent Army Regulations.

. . . . .

50,105-2 In the administration of cost-plus-a-fixed-fee contracts under which the contracting officer has authority to designate the point at which title will pass to the Government, the contracting officer, in accordance with PR 1182-C, will direct the contractor to cause delivery to be taken by the Government and title to materials and supplies to vest in the Government at the point of origin, subject to final inspection and acceptance at destination. Such power will be exercised unless savings will not be realized thereby under all the circumstances or unless, in the judgment of the contracting officer, such action will definitely, demonstrably and materially interfere with or delay performance of the contract in view of the administrative or other difficulties involved.

. . . . .

53,003.1 Reference is made to ASF Manual M404, AR 55-155 and AR 55-150. Government bills of lading on outbound shipments must be signed either by the transportation officer issuing such bills of lading or by his designated civilian assistant who must be an employee of the War Department. At CPFF establishments it is recommended that the preparation of Government bills of lading be made by the contractor for the signature of the transportation officer or his designated assistant.



53,009.1 On all contracts it will be the responsibility of the establishment administering the prime contract to designate an Accountable Property Officer within their organization to be accountable for all property in connection with that contract.

57,100.3 Commanding Officer's Responsibility.—Government-owned contractor-operated plants are military reservations. Commanding officers appointed by War Department orders are responsible for the safety of all personnel and Government property. The following is an extract from AR 210-10:

- 4. . . . b. He will be responsible for
  - (1) The safety and defense of the post. . . .
  - (4) The reservation, proper application, and use of public property.
  - (5) The strict enforcement of laws and regulations. . . .
  - (9) The guarding of the public interests in every particular.

It is, therefore, important that all commanding officers issue regulations that will insure the maximum protection to all personnel and to Government property in any event. These general regulations should be cooperatively issued by the contractor and the commanding officer. The commercial safety experience is ordinarily with the contractor and the military responsibility is in the commanding officer. The enforcement of these rules is discussed in OPI 57,002.

8,405.2 An exemption is authorized from the tax imposed by Section 3475 of the Internal Revenue Code (26 U. S. C. 3475) as to the payment for transportation of property to or from the Government of the United States shipped on a United States Government bill of lading. (Order of the Secretary of Treasury dated 29 April 1944, Federal Register 2 May 1944, Vol. 9, No. 87, F. R. Doc. 44-6128.)

8,405.3 Contracting officers, in administering cost-plus-a-fixed-fee contracts, are not, for the sole purpose of avoiding the payment of the Federal transportation tax, to arrange for the transportation of property upon the United States Government bill of lading. It should be noted in this connection that the payment of the transportation tax by a cost-plus-a-fixed-fee contractor, and a subsequent reimbursement of the contractor by the Government merely transfers funds from one Government agency to another.

. . . . .

9,101.1 Statement of Labor Policy Dated June 22, 1942.

The War and Navy Departments on June 22, 1942, issued a Statement of Labor Policy governing Government-owned, privately-operated plants, the backbone of the Nation's armament program. Under the terms of the Congressional mandate by which their construction and operation was authorized, the War and Navy Departments were given the option of themselves operating the plants or of operating them through the agency of selected qualified commercial contractors. The War Department chose the latter course and in doing so created industrial units of a novel and peculiar character. They have many significant features which combine to form a unique relationship between the operating contractor and the War Department and consequently the handling of many problems, including that of labor relations, must necessarily be slightly different than in the case of wholly private plants. The primary responsibility for dealing with problems relating to the employment of labor is with the contractor since he is hired for the express purpose of utilizing his skill and experience in running the plant and taking care of all questions of personnel. Because of the relationship which obtains, however, the War Department has the responsibility to see that each plant is operated in accordance with all laws and Executive Orders, and in such a manner as to provide for the safety and protection of the plant and its personnel, and to insure maximum production at a reasonable cost. The various provisions of the Statement of Labor Policy, dated June 22, 1942, are referred to in the provisions of this section which follow.

. . . . .

### 9,107.1 War Department Responsibility:

The War Department has contractual responsibility for the approval of pay-roll costs. Thus, notwithstanding approvals by the War Department Wage Administration Agency under the Executive Orders and statute dealing with national wage and salary stabilization, approvals by the contracting officer's representatives are also required for purposes of reimbursement of expenditures made pursuant to initial wage and salary scales and any adjustments therein, save only of such individual adjustments within established and approved wages and salary ranges as are permitted without approval pursuant to OPI 9,107.3 and OPI 9,107.4 (not including individual adjustments in salaries in excess of \$6,000 covered by OPI 50,006.1).

57,200.7 Jurisdictional status of Ordnance establishments.—The Office of the Chief of Engineers reports that the Federal Government has attained exclusive jurisdiction in certain establishments over which the Chief of Ordnance has retained responsibility in plant protection matters. The following list will be amended from time to time as jurisdiction is obtained at additional plants. Inquiry as to the present jurisdictional status of establishments not listed hereafter may be addressed to Safety and Security Branch, Washington Liaison Office, Attention of Legal Unit, Office of the Chief of Ordnance, Washington, D. C.

Name

Exclusive

Jurisdiction

Louisiana Ordnance Plant

10-10-42

# **BRIEF AMICUS CURIAE**



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IN THE

## Supreme Court of the United States

OCTOBER TERM, 1947

No. 590

HARRIS KENNEDY, ET AL.,

*Petitioners,*

*versus.*

SILAS MASON COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF E. I. DU PONT DE NEMOURS & COMPANY  
AS AMICUS CURIAE

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# Supreme Court of the United States

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No. 590

HARRIS KENNEDY, ET AL.,

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*Petitioners*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF E. I. DU PONT DE NEMOURS & COMPANY  
AS AMICUS CURIAE

The written consent of Petitioners and Respondent to the filing of this brief has been filed with the Clerk.

## PRELIMINARY STATEMENT

During the period from 1940 to 1945, E. I. du Pont de Nemours & Company constructed and operated for the United States Government, under cost-plus-a-fixed-fee contracts, nine Government-owned ordnance plants.<sup>1</sup> In connection with its

The Chickasaw Ordnance Works at Memphis, Tennessee; the Indiana Ordnance Works at Charlestown, Indiana; the Alabama Ordnance Works at Birmingham; the Oklahoma Ordnance Works at Tulsa; the Gopher Ordnance Works at St. Paul, Minnesota; the Wabash River Ordnance Works at Terre Haute, Indiana; the Kankakee Ordnance Works at Joliet, Illinois; the Hanford Engineering Works at Hanford, Washington; and the Morgantown Ordnance Works at Morgantown, West Virginia.

operation of these plants the Company has been sued in numerous places by large numbers of employees asserting claims under the Fair Labor Standards Act. Still pending in various federal courts are claims of 3500 or more employees for sums which exceed \$10,000,000. The factual situations in these cases are essentially the same as that here. In each of them the Company has asserted, among other defenses, that plaintiffs are not entitled to recover under the Act because the munitions upon which they worked were not "goods" within the meaning of the Act, and because the munitions were not produced for "commerce" within the meaning of the Act. Both of these propositions are involved in the instant case.

The du Pont Company believes that it will be reimbursed under its cost-plus-a-fixed-fee contracts for any judgments which may be rendered against it in the above proceedings. In those contracts, however, it agreed that it would at all times protect the interest of the Government. It is therefore filing this brief urging that the decision below be affirmed upon the ground that the Court held correctly that Petitioners were not engaged in the production of "goods" for "commerce" within the meaning of the Fair Labor Standards Act.

No position is taken upon the question whether Respondent was an independent contractor or an agent of the Government, or upon the question whether Petitioners were employees of the Respondent or of the Government.

### STATEMENT OF THE CASE

Petitioners' and Respondent's statements of the case are accepted; with the one exception that Petitioners' statement (Br. p. 4) that "The Silas Mason Company bought the raw materials in the open market," appears to be inaccurate. The record indicates that all component parts of the ammunition<sup>2</sup> assembled

<sup>2</sup>20 mm shells, 15 mm shells, 100 lb. bombs (R. 26), mines, 3" shells, 500 lb. bombs (R. 160), minor and medium caliber ammunition, 250 lb. bombs, fuses, boosters. (R. 172-173), 4.2" chemical mortar shells (R. 186).



at the Louisiana Ordnance Plant, including shipping materials and containers, were furnished by the Government, as Government property, and shipped by the Government to the plant when and as requisitioned from time to time by Respondent (R. 21, 45).

In addition to the facts set forth in Petitioners' and Respondent's statements and in the record, it is respectfully requested that the Court take judicial notice of *Ordnance Procurement Instructions*, issued by direction of the Chief of Ordnance on November 30, 1942, pursuant to the authority conferred upon him by paragraphs 107.9 and 107.10 of War Department Procurement Regulations, as in effect December 1, 1942, and particularly Parts 50 and 57 thereof, excerpts from which are attached hereto as an Appendix.<sup>3</sup> These regulations evidence that the Government, through the War Department, was physically present at the Louisiana Ordnance Plant throughout the period in question and in actual physical possession of the plant and all equipment and materials located on the premises.

It is further requested that the Court take judicial notice of a directive issued by order of the Chief of Ordnance on July 29, 1942, signed by R. W. Johnson, Colonel, Ordnance Department, containing a Statement of War Department Labor Policy to all Government-Owned, Contractor-Operated Facilities, and, in particular the following statements therein contained:

"Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. \* \* \*

"All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture

<sup>3</sup>The Court may take judicial notice of *Ordnance Procurement Instructions*. *Standard Oil Co. of California v. Johnson*, 316 U.S. 481 483, 484.

and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under 'Management Service' contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government has title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, Labor, and Management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable."

### SUMMARY OF ARGUMENT

The decision of the court below that Petitioners were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act should be affirmed for the following reasons:

#### I

The background and legislative history of the Act, the Congressional findings and declaration of policy, and the decisions of this Court show that the evil sought to be remedied by the Act was the spread of substandard labor conditions through the use of the facilities of interstate commerce. Goods produced under substandard conditions ~~and~~ moved across state lines and competed unfairly with goods produced under better condi-

tions. It was the intention of Congress to suppress this competition by regulating the interstate distribution of goods which competed with other goods in a commercial sense. Congress did not intend the Act to be applicable to goods, such as Government-owned munitions of war which, though transported across state lines, did not and could not in any manner compete with other goods. Contrary to the suggestion of Petitioners, it was indicated during the debates on the Portal-to-Portal Act that there was considerable doubt whether the Fair Labor Standards Act, as distinguished from the Walsh-Healey and other Federal Acts, was applicable to Government-owned ordnance plants of the kind involved here.

## II

The general definition of "goods" in Section 3 (i) of the Act itself shows that the goods with which the Act is concerned are articles or subjects of commerce in the generally recognized commercial sense. Articles produced solely for war, such as shells and bombs, are the exact opposite of the goods to which the Act was intended to apply. Warships, for example, have been held not to be goods within the general definition, even though "ships" are expressly included.

## III

Even if Petitioners produced "goods" within the general statutory definition, the ammunition was not "goods," because it falls within the exclusory clause of Section 3 (i) of the Act. This Section defines "goods" so as to exclude goods after delivery to the ultimate consumer other than a producer, manufacturer or processor. The exclusory clause defeats Petitioners' claims whether it be applied to the finished ammunition or to the component parts of the ammunition.

The finished ammunition was covered by the exclusory clause because it was delivered to the Government, the ultimate consumer, at the plant site prior to shipment out of the state. The

Government was not a producer because it did nothing but ship and consume the ammunition. Since the ammunition lost its character as "goods" prior to shipment, there was no transportation of goods in commerce and consequently no production of goods for commerce.

The component parts of the ammunition were likewise covered by the exclusory clause because they came into the possession of the Government at or prior to the time when they were first delivered to the plant site. The Government was certainly the ultimate consumer of the parts. Petitioners concede, in fact they insist, that the Government was not the producer. But whether or not the Government was the producer, it was still the ultimate consumer because it actually consumed everything which came into its possession and nothing remained. The exception for the producer, manufacturer or processor contained in the exclusory clause was clearly designed for the apparent ultimate consumer who consumes goods but in so doing produces other goods which leave his possession and are not consumed by him.

#### IV

If Petitioners produced "goods" at all, they did not produce them for commerce. They produced ammunition for the Government to be shipped by the Government from the plant site. The Government in so shipping the ammunition was exercising its power to wage war, which is the exact opposite of engaging in commerce. The commerce power was delegated to the Government by the people. It is a power to regulate commerce among the people, and not a power given by the people to the Government to regulate itself. The war power, on the other hand, is inherent in the Federal Government, and in wartime is supreme. When the Government ships ammunition across state lines it is acting solely under the war power. It is inconceivable that the Constitution was framed so as to permit a head-on collision between the war and commerce powers. Yet this is the necessary result if it be held that action taken pursuant to the



war power is commerce and therefore subject to the regulation of the commerce power.

If it wishes, Congress admittedly may subject war activities to earlier enacted Commerce Clause regulations, such as the Fair Labor Standards Act, but it must do so under the war power and not under the commerce power. No such step was taken here.

Since it is apparent that shipment by the Government of its own ammunition under the circumstances involved here was an activity under the war power and not commerce, the Fair Labor Standards Act, being an exercise of the commerce power alone, does not apply to it.

## ARGUMENT

### POINT I

**CONGRESS INTENDED THE FAIR LABOR STANDARDS ACT TO APPLY ONLY WITH RESPECT TO GOODS MOVED INTERSTATE IN COMPETITION WITH OTHER GOODS IN A COMMERCIAL SENSE.**

The background and legislative history of the Fair Labor Standards Act, the findings and declaration of policy set forth in Section 2 thereof, the provisions of the Act itself, and the decisions of this Court construing the Act, demonstrate that Congress intended the Act to be applicable in respect of goods moving across state lines in competition with other goods in a commercial sense. Congress did not intend the Act to be a regulation of the movement across state lines of Government-owned munitions which do not and could not in any manner compete with other goods moving across state lines. The labor conditions under which such munitions were produced could not possibly affect other goods competitively by their subsequent movement from one state to another.

The general purpose of federal wage and hour legislation is readily apparent from the legislation introduced and enacted as a result of the depression of the 1930's. The hearings before Congressional committees held in connection with the proposed 30-hour week bills<sup>4</sup>, The National Industry Recovery Act<sup>5</sup>, the Ellenbogen Bill for the regulation of the textile industry<sup>6</sup>, the First Guffey Coal Act<sup>7</sup>, and the Fair Labor Standards Act itself are replete with statements as to the unfair competitive advantage accruing in interstate markets to employers with lower labor standards.

The first attempt to solve the problem on a broad scale was the National Industrial Recovery Act. When this Act was invalidated, Congress determined that it could require proper labor standards at least from those who would do business with the Government. It enacted the Walsh-Healey Public Contracts Act<sup>8</sup>, providing that Government contracts be awarded only to persons who would comply with certain minimum standards, including minimum wages and maximum hours.

In May, 1937, the President requested Congress to take further action with respect to labor conditions. He pointed out that unrestrained interstate competition produced serious social consequences and recommended that the channels of interstate commerce be closed to goods produced under conditions which did not meet certain standards. The bills which became the Fair Labor Standards Act were introduced.

The major testimony in the extensive Congressional hearings on the bills proves that the heart of the problem, so far as the

<sup>4</sup>H.R. 14518, 72d Cong., 2d Sess.; H.R. 4557, 73d Cong., 1st Sess.; H.R. 8492, 73d Cong., 2d Sess.; H.R. 7198, 74th Cong., 1st Sess.; see H. Repts.: No. 1999, 72d Cong., 2d Sess.; No. 24, 73d Cong., 1st Sess.; No. 889, 73d Cong., 2d Sess.; No. 1550, 74th Cong., 1st Sess.

<sup>5</sup>48 Stat. 195.

<sup>6</sup>H.R. 9072, 11770, 12285, 74th Cong., 2d Sess.; H. Rept. No. 2590, 74th Cong., 2d Sess.; H.R. 238, 75th Cong., 1st Sess.

<sup>7</sup>49 Stat. 991.

<sup>8</sup>49 Stat. 2036.

national economy was concerned, was that goods produced under substandard conditions moved across state lines in competition with other goods and in this manner the substandard conditions were spread.<sup>9</sup>

The Committee Reports on the bill which became the Fair Labor Standards Act are to the same effect. For example, the House Committee Report, No. 2182, 75th Cong., 3rd Sess., p. 7, summarizes the facts upon which the legislation rests:

"Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony at the joint hearings held on H.R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce have been open to goods produced under substandard labor conditions; \* \* \*"

The Senate Committee Report, No. 884, 75th Cong., 1st Sess., pp. 4-5, contains the following statement:

"This law proposes to accomplish this purpose by closing the channels of interstate commerce to goods produced under conditions which do not meet the rudimentary standards of a civilized democracy. \* \* \* It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce."

The Fair Labor Standards Act itself outlines its objectives as follows:

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<sup>9</sup>Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H.R. 7200, pp. 93-95, 111, 127, 134, 140, 160, 175, 183, 187, 193, 200, 245, 250, 309-316, 365, 397-398, 402, 403-407, 413-414, 455.

### "Finding and Declaration of Policy

"Sec. 2 (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) *causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States;* (2) *burdens commerce and the free flow of goods in commerce;* (3) *constitutes an unfair method of competition in commerce;* (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;* and (5) *interferes with the orderly and fair marketing of goods in commerce.*

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."<sup>10</sup>

So far as the distribution of goods is concerned, therefore, it is the declared purpose of the Act to regulate the movement of goods which compete unfairly with other goods, because of the conditions under which they were produced. The definition of the term "goods" (Sec. 3 (i) ), with its exclusion of goods in the hands of ultimate consumers, is a further demonstration of this purpose.

This Court has recognized that the intention of Congress was to regulate the production and movement of goods which compete with other goods in a commercial sense. In *United States v. Darby*, 312 U. S. 100, the Court, speaking through Mr. Justice Stone, said (p. 115):

"The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made

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<sup>10</sup>Italics supplied throughout this brief unless otherwise indicated.



the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows."

and again (p. 122):

"\* \* \* As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; \* \* \* The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair,' as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce. \* \* \*"

Not only does the background and history of the Fair Labor Standards Act demonstrate that Congress intended to apply the Act to an area which does not include the situation involved here, but any attempt to apply the Act to the instant case leads to results which Congress clearly cannot have intended. For example, if, as Petitioners contend, Respondent is their employer and is liable to them under the Fair Labor Standards Act, the Government will ultimately pay the bill which will include liquidated damages and attorneys' fees. The cost-plus-a-fixed-fee contract produces this result. Although authorization for cost-plus operations indicates a willingness to bear the cost of overtime, it seems inconceivable that Congress could have intended that the Government pay liquidated damages and attorneys' fees, in view of the express provisions of the earlier enacted Public Contracts Act, under which the Secretary of Labor acts for the underpaid employees of a Government contractor and neither unpaid overtime compensation nor liquidated damages nor attorneys' fees are added to the Government's bill.

It is no less difficult to believe that Congress intended the "hot goods" section of the Act (Section 15 (a) (1)) to apply to

shipments of ammunition which had not been produced in accordance with the standards of the Act.

The inapplicability of the Fair Labor Standards Act to Respondent's employees does not mean that they were without protection against substandard labor conditions. The Act of July 2, 1940,<sup>11</sup> which authorized the Secretary of War to enter into the cost-plus-a-fixed-fee contract with Respondent (R. 22) contains an express reference to the Walsh-Healey Act. This Act, compliance with which was a specific condition of the contract between the Government and Respondent (R. 47-50), contains broad protective provisions, which in important respects are more favorable to employees than the minimum standards required by the Fair Labor Standards Act.<sup>12</sup>

Petitioners argue (Br., pp. 28-29) that during the war bills introduced in Congress to suspend the Fair Labor Standards Act were rejected and that this non-action plus the legislative history of the Portal-to-Portal Act suggest that Congress believed the Fair Labor Standards Act applicable to employees of cost-plus-a-fixed fee contractors. It was made clear, however, during the course of the debates on the Portal-to-Portal Act that there were serious doubts whether Fair Labor Standards

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<sup>11</sup>Public No. 703, 76th Cong., 3rd Sess., c. 508, 54 Stat. 712.

<sup>12</sup>Under the Walsh-Healey Act and the regulations issued pursuant thereto an employee is entitled to overtime for hours worked in excess of eight per day, whereas under the Fair Labor Standards Act he would not be entitled to overtime until he had worked forty hours during a week. In addition, the Walsh-Healey Act provides that an underpaid employee may call upon the Secretary of Labor for assistance, whereas under the Fair Labor Standards Act he must employ an attorney and bring suit himself. The Walsh-Healey Act is mentioned here not for the purpose of suggesting that this Act and the Fair Labor Standards Act may not under some circumstances apply to the same employees, but to show that Respondent's employees had the protection of a federal statute and of the power of Congress to improve upon that statute even though they are not covered by the Fair Labor Standards Act.

Act suits could be maintained against cost-plus-a-fixed-fee contractors.<sup>12</sup>

It is submitted that the background and legislative history of the Act, its declared purposes and penalties, and the obvious incongruities which would otherwise exist demonstrate beyond question that Congress did not intend the Act to apply to the type of situation involved here.

<sup>12</sup>During the course of the debates on H.R. 2157, which became the Portal-to-Portal Act, Senator Donnell, one of the authors of the Act, made the following statement on the floor of the Senate (Vol. 93, Cong. Rec. No. 54, 80th Cong., p. 2442): "Mr. President, those two acts should be included. In the first place, it is true, of course, that few suits, if any, have been filed hitherto under the Bacon-Davis Act or the Walsh-Healey Act. The reason is clear. It is that under those acts all a man can recover is the amount of wages to which he is entitled. Under those acts no one is entitled to recover liquidated damages equal to the amount of wages to which he was entitled. However, Mr. President, two facts should be noted. In the first place, great difficulties may develop for employers in the future under the Fair Labor Standards Act, because in the case of war contracts, there is great doubt whether suits, even though nominal, against employers are in fact against the Government, and obviously under the Fair Labor Standards Act a suit cannot, by the express provisions of that act, be maintained against the Government.

"Furthermore, it may well be held that suits may not be filed and successfully maintained by employees who were working on war contracts, because interstate commerce might not be involved in such suits. There is now in existence a subcommittee of this body which has been looking into the fact that at one time the Attorney General directed that these two defenses—namely, the absence of the interstate commerce element and the fact that the Government is the real party in interest—be made."

The U. S. Attorney represented the contractor-employer in *Anderson v. Federal Cartridge Corp.*, 13 C.C.H. Labor Cases ¶64,072 (U.S.D.C., D. Minn., 1947), not officially reported, in which the defense that the Fair Labor Standards did not apply to a situation like that here was sustained. The U. S. Attorney approved similar defenses urged by the contractor-employer in *Divins v. Hazeltine Electronics Corporation*, 70 F. Supp. 686 (S.D.N.Y., 1946), modified in 163 F.(2) 100 (C.C.A. 2, 1947), see Brief of Defendants-Appellees in the Circuit Court of Appeals, p. 3. It should be noted, too, that an army officer, Bert E. Church, urged the same defense successfully in *Umthun v. Day & Zimmerman, Inc.*, 7 C.C.H. Labor Cases ¶61,977 (D. Ct., Des Moines Co., Ia., 1944), not officially reported, reversed, 235 Iowa 293 (1944), as well as in *Trefs v. Foley Bros. Inc.*, 7 C.C.H. Labor Cases ¶61,743 (U.S.D.C., W. D. Mo., 1943), not officially reported.

Points II, III, and IV of this brief demonstrate with greater particularity that petitioners were not engaged in the production of goods for commerce, either within the general legislative intent or within the meaning of the provisions which they invoked below.

## POINT II

### **PETITIONERS WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE BECAUSE THE AMMUNITION PRODUCED DID NOT CONSTITUTE GOODS WITHIN THE FAIR LABOR STANDARD ACT'S GENERAL DEFINITION OF THE TERM.**

The definition of "goods" in the Fair Labor Standards Act itself evidences that the "goods" with which the Act is concerned are solely items of trade or commerce in the general sense. That definition, without the exclusion which is considered in Point III, *infra*, is as follows:

"Sec. 3. As used in this Act—

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, \* \* \*"

The language "wares, products, commodities, or articles or subjects of commerce" evidences the intent of Congress to limit the definition to articles or subjects of trade in the commercial sense. This conclusion is supported by the parenthetical specification of "ships," items which ordinarily would not fall within this category.

The same concept appears in other parts of the Act. Section 2, for example, containing the Congressional declaration of policy, refers to "industries engaged \* \* \* in the production of goods," to the "free flow of goods," to "competition," and to "the orderly and fair marketing of goods."



The various types of ammunition assembled and loaded at the Louisiana Ordnance Plant are the exact opposite of the goods or articles of commerce to which the Act was intended to apply. The ammunition was produced solely for use by the Government in the prosecution of the war. It was produced at a plant which was owned by the Government from parts which were owned and supplied by the Government. It was not marketed; it did not enter competition with other goods; and it was in no sense an ordinary commercial article or an ingredient thereof.

In *Divins v. Hazeltine Electronics Corporation*, 163 F. (2d) 100 (C. C. A. 2, 1947), the Circuit Court of Appeals for the Second Circuit squarely held that battleships, cruisers and destroyers, were not "goods" within Section 3 (i) of the Act, despite the express mention of "ships" in the definition. The court said (p. 102):

"\* \* \* But most of the vessels on the repair or servicing of whose equipment the plaintiffs did their work were war vessels operated by the United States or by allied nations in the prosecution of the war. In any realistic use of words such vessels would seem to be instrumentalities of war, not of commerce. It is true that warships transport men, munitions, food for crew and troops, and occasionally, perhaps, supplies for civilians; and they may at times transmit radio messages for civilians. See *Ritch v. Puget Sound Bridge & Dredging Co.*, 9 Cir., 156 F. (2d) 334, 335. This literally satisfies the statutory definition of commerce, but such transportation or communication is merely incidental to the war purpose for which the vessel is actually being used. To hold that workmen who repair aircraft carriers, battleships, submarines or other types of vessels used as weapons of war are 'engaged in commerce,' stretches the quoted words, elastic though they may be, beyond all reasonable limits. \* \* \*

\* \* \*

"\* \* \* The same considerations which support the view that the appellants were not engaged in commerce in re-

pairing equipment on war vessels lead to the conclusion that 'ships' was not intended to embrace vessels of this type. \* \* \*

Similarly, in *Young v. Kellex Corporation*, 14 C. C. H. Labor Cases ¶64,244 (U.S.D.C., E.D. Tenn., 1948), not officially reported, the court held that atomic bombs were not "goods" under the Act. After an exhaustive review of the history of the commerce clause, the court held that an atomic bomb, although a product of manufacture moving across state lines and looking like a commercial article was not "an article of commerce" within the meaning of the Fair Labor Standards Act. The court said (p. 72,537):

"It is not enough that goods exist as a result of productive processes. They must be goods of commerce, or wares of commerce, or merchandise of commerce, after they have been produced. \* \* \*

The same rationale was applied by the court in *Kruger v. Los Angeles Shipbuilding and Dry Dock Co.*, 12 C. C. H. Labor Cases ¶63,660 (U.S.D.C., S.D. Calif., 1947), not officially reported. In holding that the Act did not apply to employees engaged solely in repair of Navy vessels, the court stated (p. 70,736):

\* \* \* There was no commercial feature involved in its operations at the plant, as its activities were confined exclusively to the manufacture and repairing of vessels for the United States Navy, \* \* \*

See also *St. Johns River Shipbuilding Co. v. Adams*, 164 F. (2d) 1012 (C. C. A.-5, 1947).

The reasoning of these cases applies with equal force to the situation here present. The ammunition assembled at the Louisiana Ordnance Plant may have resembled, but it obviously was not a commercial article. Petitioners were therefore not engaged in the production of "goods" for commerce, and the decision of the court below should be affirmed.

## POINT III

**PETITIONERS WERE NOT ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE BECAUSE THE AMMUNITION PRODUCED FALLS WITHIN THE EXCLUSORY CLAUSE IN THE STATUTORY DEFINITION OF GOODS.**

Even if it be assumed *arguendo* that the ammunition constituted "goods" within the general definition of the term set forth in Section 3 (i) of the Act, it is nevertheless excluded from the category of "goods" by the exclusory clause contained in the second portion of the definition. Section 3 (i) in its entirety reads as follows:

"Sec. 3. As used in this Act—

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, *but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.*"<sup>14</sup>

As will be seen, the exclusory clause in Section 3 (i) defeats Petitioners' claims whether it be applied to the finished ammunition or to the component parts of the ammunition.

The courts below viewed the case as one in which the finished ammunition was delivered into the actual physical possession of the Government, the ultimate consumer thereof, at the plant site prior to its shipment out of the state, so that the exclusory

<sup>14</sup>It is apparent that the phrase "other than a producer, manufacturer or processor thereof" refers to an ultimate consumer who consumes goods in the production of other "goods." An ultimate consumer is one who consumes or uses up. He cannot simultaneously be the consumer and the producer of the same goods.

clause became applicable at this point (R. 232, 239 and 154 F. (2nd) 1016, 1018). We take up this ground first and then the alternative proposition that the goods, i.e., the component parts of the ammunition, were delivered into the actual physical possession of the Government, the ultimate consumer thereof, at or prior to the time they first arrived at the plant site, so that the exclusory clause became applicable at that point. This second ground was not reached by the courts below in view of their dismissal of the complaint on the first ground.

Petitioners concede that the finished ammunition was delivered into the actual physical possession of the Government at the plant site prior to its shipment out of the state. (Br. p. 9) It is also clear that the Government was the ultimate consumer of the finished ammunition. The utilization of ammunition in the prosecution of a war is the quintessence of consumption.<sup>15</sup> And, it is equally clear that the Government was not a producer, manufacturer or processor of the finished ammunition. The Government did no more than ship and consume the ammunition.

Upon these facts, about which there is no real disagreement, it is apparent that the finished ammunition had lost its character as "goods" before it was shipped from the plant by the Government. This being the case, "goods" did not move in commerce and there cannot have been a "production of goods for commerce" within the meaning of the overtime provision of the Act (Sec. 7) invoked by Petitioners.

The court below, adopting the view of several other federal

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<sup>15</sup>Petitioners suggest (Br. pp. 39-40) that Allies may have used some of the munitions under the Lend-Lease Act. There is no basis for such an inference in the record. Furthermore, such use would not affect the application of the exclusory clause. *Divins v. Hazeltine Electronics Corporation*, *supra*.



courts, dismissed the complaint upon this ground. The court said (164 F. (2d) 1016, 1018):

"On the other hand, if the defendant was not an agency or instrumentality of the United States, and if the munitions were articles of commerce within the contemplation of the Act, and if the United States was not the producer of the munitions, and if the subparagraph (d) of Sec. 3 of the Act, excluding the United States from its operation, is not applicable, then there would seem to be no escape from the conclusion that since the finished products and all their ingredients are the property of the United States and delivered to it as the ultimate consumer of the goods, the Act, under subparagraph (i) of Sec. 3, would still be inapplicable because the term 'goods' does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof.' Since the Government is the ultimate consumer, and since the goods were delivered into its actual physical possession as ultimate consumer, any movement of the goods thereafter by the ultimate consumer over state lines would not relate back and take the goods out of the exception of subparagraph (i) of Sec. 3 of the Act. *Divins v. Hazeltine Electronics Corp.*, 2 Cir., 163 F. 2d 100."

In the *Divins* case<sup>16</sup> relied upon by the court below, the Circuit Court of Appeals for the Second Circuit held that radar equipment being installed on warships had ceased to be "goods within the meaning of Section 3 (i) of the Act because the equipment was in the actual physical possession of the ultimate consumer, the United States Navy, which was not a producer, manufacturer, or processor of the equipment."<sup>17</sup>

In *Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (E.D. Ark., 1947), involving circumstances virtually identical with these here, it was also held that finished ammunition deliv-

<sup>16</sup>*Divins v. Hazeltine Electronics Corp.*, *supra*.

<sup>17</sup>See *infra* p. 24 for further discussion of the *Divins* case, and particularly its holding with respect to the installation of radar equipment on cargo ships.

ered to the Government at the plant site had ceased to be "goods" and that there had consequently been no production of goods for commerce. The court said (p. 694):

"\* \* \* After these goods were worked on by the plaintiff, the United States shipped the same under Government bill of lading to military facilities outside of the state. If it can be said that the goods were in the constructive rather than actual possession of the Government while they were being processed, they were certainly in the actual physical possession of the Government when they were shipped. The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence the United States in our opinion was the ultimate consumer thereof within the meaning of the Act, and the plaintiff was not engaged in the 'production of "goods" for commerce.'"

In *Anderson v. Federal Cartridge Corp.*, 13 C. C. H. Labor Cases ¶64,072 (U. S. D. C., D. Minn., 1947), not officially reported, the court held (p. 72,011):

"\* \* \* all of the ammunition produced at the defendant's plant, \* \* \* was placed in the actual physical possession of the Government and \* \* \* the Government was the ultimate consumer thereof. When such finished products were accepted by the Government, they were completely and permanently removed from the channels of commerce. They were then in the hands of the 'ultimate consumer'—namely, the Government, which is not shown to be either a 'producer, manufacturer, or processor thereof' within the meaning of the Act. \* \* \* The manufactured products here were to be ultimately consumed solely by the Government in the prosecution of the war and accordingly come clearly within the meaning of the Act. \* \* \*"

These decisions are directly applicable here. The finished ammunition had been permanently removed from the channels of commerce by its delivery at the plant site into the actual physical possession of the Government, the ultimate consumer. At that point it ceased to be "goods." Its subsequent shipment

did not constitute a shipment of "goods" in commerce and its production was not a "production of goods for commerce." Application of the Act to the production here may not, therefore, be predicated upon the movement of the finished ammunition after its delivery to the Government at the plant site.

The same result follows, and the decision below should also be affirmed, if the case is considered on the basis of the second ground referred to above, namely, that the goods, i.e., the component parts of the ammunition, were in the actual physical possession of the Government at least from the time they were first delivered to the plant. Although the Courts below did not reach this question in view of their decision on the first ground, it is nonetheless clear that the exclusory clause of Section 3 (i) defeats Petitioners' claims when applied to the component parts of the ammunition.

The Government itself furnished all component parts for the loading and assembling of the ammunition and appears to have had them in its possession even before they were brought to the plant. The plant was a military reservation subject to Army regulations and under the exclusive jurisdiction of the United States. The Government owned and possessed the land and the buildings in which the assembly and loading operations were carried on, as well as all materials and equipment in and around the buildings. The Government exercised a strict and far-reaching military and physical control of all property through its commanding officer and his military and civilian staff. Petitioners came upon the premises and worked upon the component parts but at no time were they or Respondent in possession of the parts in the sense that they had a right to deal with them as their own or to do anything with respect to them which they were not instructed or permitted to do by the Government.

Under these circumstances, the presence of Petitioners and Respondent no more disturbed or interfered with the Govern-

ment's physical possession of the component parts of the ammunition than the presence of a contractor and his employee-mechanics would disturb the Government's physical possession of its own automobiles, if the latter engaged the former to come to a Government establishment and repair the cars. In a very real sense the Government had actual physical possession of all parts and materials at the Louisiana Ordnance Plant during the period Petitioners claim to have worked there.

Obviously the Government was the ultimate consumer of the component parts which, when assembled, became the finished ammunition; certainly, no one else consumed them.

Consequently, on this second ground, the exclusory clause is applicable unless the Government was the "producer, manufacturer or processor" within the meaning of the exception to the exclusory clause. Even Petitioners do not contend this, for the essence of their case is that Respondent and not the Government was the producer. If the Government were the producer, there is no escape from the alternative holding below that it was also the employer of Petitioners, in which case Petitioners fail because the Government is excluded from the definition of "employer" in Section 3, (d) of the Act.

Furthermore, even if it be assumed *arguendo* that the Government was a producer in the sense that it caused the production to occur, this would not affect the applicability of the exclusory clause under the circumstances of this case.

As has been seen,<sup>18</sup> the exception to the exclusory clause applies only to an ultimate consumer who consumes goods in the production of other "goods," since by general understanding and dictionary definition, an ultimate consumer of goods cannot simultaneously be a producer of the same goods. The exception was added, of course, because such a consumer in the very process of consumption, produces other goods which he

<sup>18</sup>Footnote 14, *supra*.



does not consume and which enter the stream of commerce. Goods in the hands of an ultimate consumer, therefore, are excluded from the Act's coverage by the exclusory clause unless they are used (and thus consumed) in the production, manufacture or processing of other "goods." This interpretation accords with the framework of the Act and the purpose of Congress to limit its application to commercial activities, and has the support of *Roland Electrical Co. v. Walling*, 326 U.S. 657, where this court stated (p. 678):

"Although in this case the motors sold by the petitioner were not purchased by its customers for resale or to be processed for resale, and although they were to be used and probably ultimately to be 'consumed' in the hands of the petitioner's customers, these motors remained actively in use in the production of the 'flow of goods in commerce.' It is to this great field of the production of goods for interstate commerce that the Act is directed.

"The record establishes the 'commercial and industrial' character of the petitioner's customers. \* \* \* The Fair Labor Standards Act is concerned with goods in the stream of commerce but not with those in 'the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.' See § 3 (i), *supra*."

The controlling distinction between the *Roland Electrical Co.* case and this case is this: in that case the consumers of the motors produced other goods which they did not consume, whereas in this case, the consumer of the component parts, i.e., the Government, produced other goods, i.e., the finished ammunition, which it did consume. There was in this case no end product which escaped into the channels of commerce. It is apparent therefore that even if the Government is regarded as the producer, it is still an ultimate consumer within the meaning of the exclusory clause.<sup>19</sup>

<sup>19</sup>If an ultimate consumer consumes Article A in the production of Article B, but also consumes Article B and in so doing produces no other articles, Article B is not "goods" under the statutory definition because it is consumed and not used in the production of other "goods." And since Article A was not used to produce "goods," Article A itself has ceased to be "goods." Hence employees who work on Article A which is used to make Article B are not working upon "goods."

Thus in *Divins v. Hazeltine Electronics Corporation, supra*, the Circuit Court of Appeals for the Second Circuit held that employees installing radar equipment on warships were not covered by the Act, because the goods, i.e., the equipment, did not constitute "goods" within the meaning of the Act. The Government was in possession of it. The Government was the ultimate consumer of it. And the Government was not the "producer, manufacturer or processor" of the equipment, even though it caused the work to be done on it, because the equipment was not being used to produce other "goods." The court reached the opposite result with respect to the installation of radar equipment on the cargo ships, on the ground that such ships were instruments of commerce. The cargo ships, like the motors in the *Roland* case, would remain actively in use in the "flow of goods in commerce."

The situation here is identical with that of the warships in the *Divins* case. The component parts of the ammunition like the radar equipment were in the hands of the ultimate consumer, and the parts here and the radar equipment there were used to make further articles, in this case finished ammunition and in that case warships. But both the finished ammunition and the warships were to be wholly consumed by the Government and were not to be used to make other "goods" or put other "goods" in the flow of commerce. The Government here was no more a "producer, manufacturer or processor" within the exception to the exclusory clause than it was in the *Divins* case.

Similarly, in *Lynch v. Embry-Riddle Co.*, 63 F. Supp. 992 (S.D. Fla., 1945), it was held that employees of a contractor whom the Government procured to repair component parts of Army airplanes, taken from planes previously in the possession of the Army and subsequently to be returned to the Army in other states, were not covered by the Act. They were working upon goods after their delivery into the actual physical possession of the ultimate consumer other than a producer. The court

emphasized that the exclusory clause was an intentional limitation upon the coverage of the Act, stating (p. 996):

*\*\*\* One of the areas carved out or exempted from the operation of the power which Congress might have exercised but did not, is that of work upon goods after such goods have come into the hands of the ultimate consumer. In this case it is quite clear that the planes and component parts thereof upon which the defendant worked were in the hands of the ultimate consumer, to wit, the Federal Government, while engaged in the prosecution of the War. The Government in using these planes, both before and after the overhaul operations thereof, conducted by the defendant, was the ultimate consumer thereof, and the Government in using the planes in the prosecution of the War for the training of pilots was not a producer, manufacturer or processor thereof."*

See also *Kruger v. Los Angeles Shipbuilding and Dry Dock Co.* (S.D. Calif.), *supra*.

Consequently, the exclusory clause became applicable here for the additional reason that the Government possessed the component parts of the ammunition throughout the period in question. Admittedly, this result follows only in exceptional circumstances such as those involved here. Except in this extraordinary situation, an ultimate consumer who causes work to be done upon goods in his possession will not be an "ultimate consumer" within the exclusory clause because it will be found that he is consuming goods in the production of other "goods" or in causing other "goods" to flow in commerce. This is true of the hypothetical cases suggested by Petitioners (Br. p. 39).

Petitioners' main argument on the exclusory clause (Br. p. 38) is that it was intended solely to protect ultimate consumers from the "hot goods" section of the Act (Sec. 15 (a) (1)). This is tantamount to saying that the word "goods" has one meaning when used in Section 15 (a) (1) of the Act and a different meaning when used in other sections of the Act, in direct contradiction of Section 3 itself which provides that the definition shall

apply wherever the term is used in the Act. The same argument was disposed of by the Circuit Court of Appeals for the Second Circuit in the *Divins* case. The court said (163 F. (2d) 100, at p. 104):

"\* \* \* The plaintiffs protest that the purpose of the exclusory clause was to protect from the penalties of §215(a) (1) persons who might innocently deal with goods that had been produced in violation of the Act, and that the clause should receive no broader interpretation. Several cases have intimated that this was the primary purpose of the clause. *Chapman v. Home Ice Co.*, 6 Cir., 136 F.2d 353, 355, certiorari denied 320 U. S. 761, 64 S. Ct. 72, 88 L. Ed. 454; *Hamlet Ice Co. v. Fleming*, 4 Cir., 127 F.2d 165, 171, certiorari denied 317 U. S. 634, 63 S. Ct. 29, 87 L. Ed. 511; *Gordon v. Paducah Ice Mfg. Co.*, D. C. W. D. Ky., 41 F. Supp. 980, 986. *But we find nothing in these cases or in the legislative history to indicate that this was the sole purpose or that the statutory definition of 'goods' is not to be given effect in determining the coverage of the Act.* \* \* \*

The legislative history of the Act suggests the contrary of Petitioners' contention. The Assistant Attorney General appearing for the Government at the hearings upon the original bills appears to have believed that the Act was not to be applied to the production of goods which were to be transported across state lines by their ultimate consumers. At a time when the bills contained an ultimate consumer exclusion but no retail or service establishment exemption, he stated that small business enterprises located near state lines would not be covered unless they actually delivered goods across state lines.<sup>21</sup> The inference is plain that such businesses were not to be covered if it was the ultimate consumers who carried the goods across

<sup>20</sup>It is significant that the cases cited in the quotation from the *Divins* case are the principal authorities upon which the Wage Hour Administrator relied in urging the court below to hold the exclusory clause inapplicable. The claimed ultimate consumers in those cases were not ultimate consumers within the exclusory clause, since the goods (ice) which they consumed were used to promote the flow of other goods in commerce.

<sup>21</sup>Joint Hearings, 75th Cong., 1st Sess. on S-2475 and H.R. 7200, p. 35.



state lines. If Congress had intended to limit the application of the exclusory clause as Petitioners contend, it would have said so expressly and not made it applicable throughout the Act.

It is submitted that the exclusory clause contained in Section 3 (i) of the Act is applicable here whether the Government had physical possession of the component parts of the ammunition throughout the period in question or received physical possession only upon delivery to it of the finished ammunition at the plant site. The decision below should be affirmed.

#### POINT IV

**EVEN IF PETITIONERS WERE PRODUCING "GOODS," THEY DID NOT PRODUCE GOODS FOR COMMERCE BECAUSE THE ARTICLES PRODUCED DID NOT ENTER COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT OR THE COMMERCE CLAUSE OF THE CONSTITUTION.**

Congress enacted the Fair Labor Standards Act in the exercise of the regulatory power given it in the commerce clause. Section 2 (b) of the Act says:

"It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, \* \* \*"

The power thus exercised was given to Congress in Article I, Section 8 of the Constitution which declares that "the Congress shall have power \* \* \* to regulate commerce \* \* \* among the several states \* \* \*."

The Act applies to persons engaged in commerce and in the production of goods for commerce. The question here is whether there was production *for commerce*. The production itself was local and beyond the reach of the commerce power unless it in some way affected commerce. If the production was not followed by the kind of interstate activity which Congress may regulate under the commerce power, the production which pre-

ceded and affected such interstate activity may not be regulated under the commerce power, and the Act does not apply to it.

This is precisely the situation which is involved in the instant case. Petitioners were producing ammunition for shipment by the Government. And the Government in causing the production to occur, and in owning and controlling the project every step of the way, and in taking the finished ammunition and shipping it abroad was exercising its power to wage war, which is the very antithesis of engaging in commerce. Therefore those who worked upon the ammunition were not engaged in the production of goods for commerce, and hence not covered by the Act.

The Court below adopted this view. It said (164 F. (2d) 1016, 1017):

"We are of opinion that transportation by the Government of Government owned munitions during war for use by its armed forces is not 'commerce' within the meaning of the Fair Labor Standards Act. \* \* \*"

"\* \* \* Our case of *Atlantic Co. v. Walling*, 5 Cir. 131 F. (2d) 518, 521, holds that the Congress in defining 'commerce' intended to give to the term the broadest possible meaning, so as 'to include such transactions, conditions and relationships as have been heretofore known and acknowledged as constituting commerce in the Constitutional sense.' It nowhere holds, or tends to hold, that the transportation during war of Government owned munitions is 'commerce' under the Fair Labor Standards Act."

And, in his concurring opinion below Judge Sibley said (p. 1019):

"\* \* \* If the Constitution had vested the war power in the federal government, and left the regulation of Commerce to the States, so that an Act like the Fair Labor

Standards Act had been enacted by the States, no one would contend that the war power was circumscribed by the States' commercial legislation. That is because war is not commerce. This case deals with war and not commerce."

In *St. Johns River Shipbuilding Co. v. Adams*, 164 F. (2d) 1012 (C.C.A. 5, 1947), decided the same day as the instant case, the Court held that the production of Navy tankers was not a production for commerce and said (p. 1015):

"\* \* \* They were goods produced for war, not for commerce. War is not commerce. There can be commerce in war equipment, but when the government itself in the midst of war has produced for immediate use in war at its own expense and in its own shipyard special type vessels as auxiliaries for its navy and to be manned by navy crews, commerce is not involved at all. The Company and its employees knew it was not. The war power of the federal government is its supreme power. When it is in action it is transcendent. \* \* \*"

As has been seen, the Circuit Court of Appeals for the Second Circuit took a similar view in *Divins v. Hazeltine Electronics Corporation*, *supra*. Cf. *National Labor Relations Board v. Reynolds Corporation*, 155 F. (2d) 679 (C.C.A. 5, 1946).

In *H. B. Deal & Co. Inc. v. Leonard*, 210 Ark. 512, 196 S. W. 2d 991 (1946), employees of a company erecting a Government-owned plant for the manufacture of war materials claimed to be engaged in the production of goods for commerce. In holding that the employees were not so engaged, the Court stated (pp. 518, 522):

"This argument is based on the fact that the plant was to be used in the manufacture and shipment of ammonium in commerce when completed, which is, in our judgment, a false assumption, since the Government would use the product of the plant for the manufacture of munitions to be used in the prosecution of the war in which we were then engaged, and, while it would cross state lines, the

Government is the sum of all the states and of itself knows no state lines in the manufacture and shipment of war material.

\* \* \*

"We, therefore, hold that appellees were not engaged in commerce or in the production of goods for commerce within the purview of the Fair Labor Standards Act, and that said Act has no application to the Government of the United States in its activities in the prosecution of a war."

See also *Anderson v. Federal Cartridge Corp.* (D. Minn. 1947) *supra*; *Kruger v. Los Angeles Shipbuilding and Dry Dock Co.* (S.D. Calif. 1947) *supra*; *Stewart v. Kaiser Co.*, 71 Fed. Supp. 551 (Ore., 1947); *Hayes v. Hercules Powder Co.*, 13 C.C.H. Labor Cases 64,123 (W.D. Mo. 1947), not officially reported; *Krill v. Arma Corporation*, 14 C.C.H. Labor Cases Par. 64,382 (U. S. D. C., E.D. N.Y., 1948), not officially reported.

Other decisions to the same effect emphasize that production of Government-owned articles for shipment by the Government is not production for commerce because shipment by the Government of its own property is not commerce but an administrative act of the sovereign. These holdings are in accord with the decision in *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129 (C.C.A. 9, 1938), where the court stated (p. 131):

"Nor is the Board's assumption of jurisdiction warranted by the fact that the United States, after purchasing respondent's product and commingling it with other gold and silver, ships the commingled product from its San Francisco mint to its Denver mint for safe keeping. Respondent does not make these shipments or cause them to be made. We regard such shipments, not as commercial transactions, but as administrative acts of Government."<sup>21</sup>

<sup>21</sup>See also *National Labor Relations Board v. Sunshine Mining Co.* 110 F. (2d) 780, 784 (C. C. A. 9, 1940); *Fox v. Summit King Mines, Limited*, 143 F. (2d) 926, 928 (C. C. A. 9, 1944).



In *Barksdale v. Ford, Bacon & Davis, Inc.* (E.D. Ark., 1947), *supra*, employees engaged in producing munitions for the Government under circumstances precisely the same as those involved here, were held not engaged in the production of goods for commerce. After a thorough analysis of the background of the commerce clause and cases on the subject, the Court said (p. 700):

"\* \* \* There have been no cases cited to us, and we have found none, which were decided prior to the enactment of the Fair Labor Standards Act, and which tended in any sense to hold that a shipment by the United States in its sovereign capacity of its own property across state lines, constitutes commerce.

"With due respect to the courts holding to the contrary, we cannot agree that the shipment involved here is anything other than an administrative act of the Government."

In *Mallock v. Sanderson & Porter*, 7 C.C.H. Labor Cases, ¶61,806 (Cir. Ct., Jeff. Co., Ark., 1943), not officially reported, also involving circumstances very similar to those involved here, the court denied recovery and said, (p. 65,305):

"\* \* \* In addition, this Court is of the opinion that the manufacture of munitions of war by the Government and the transportation thereof by the Government to points where needed, either in the United States or abroad, is not commerce as defined by the Fair Labor Standards Act, but is an administrative act by the Sovereign."

See also *Raymond v. Parrish*, 71 Ga. App. 293, 30 S.E. 2d 669 (1944); *Trefts v. Foley Bros. Inc.*, 7 C.C.H. Labor Cases ¶61,743 (U.S.D.C., W.D. Mo., 1943), not officially reported.

The validity of these decisions is apparent from the nature of and the relation between the commerce and war powers of the Federal Government.

The power to regulate commerce belonged to the States themselves before the adoption of the Constitution. *South*

*Carolina v. Georgia*, 93 U. S. 4, 10. The people of the states granted it to the newly created Federal Government. The commerce that Congress was thus empowered to regulate was that among the people of the states or the states themselves, not the sovereign activities of the newly created Federal Government. In other words, it is not a power given by the people to the Federal Government to regulate itself.<sup>23</sup>

Thus on numerous occasions this Court has indicated that commerce in the Constitutional sense consists of activities carried on by and among the people of the states.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, at p. 203, Mr. Justice Field says:

"Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

In *Addyston Pipe and Steel Company v. United States*, 175 U. S. 211, at p. 241, Mr. Justice Peckham says:

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, \* \* \*"

In *Carter v. Carter Coal Co.*, 298 U. S. 238, at p. 298, Mr. Justice Sutherland says:

"As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade', and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different States. \* \* \*"

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<sup>23</sup>It is recognized that in exercising the commerce power, the Government may itself take substantive action, i.e., build a dam or a dock, but the purpose must nonetheless be to regulate commerce among the states.

The war power, on the other hand, is one of the inherent powers of the Federal Government. *United States v. Curtiss-Wright*, 299 U. S. 304. As was said by the court in *St. Johns River Shipbuilding Co. v. Adams, supra*, (at p. 1015), "The war power of the federal government is its supreme power. When it is in action it is transcendent." When this power is exercised, the activities which are subject to the commerce power are curtailed and may even be stopped entirely. For example, the commerce between citizens of the United States and citizens of the enemy state is terminated almost automatically. When the Government enters into contracts for the operation of its own munitions plants and itself receives and accepts the munitions at the plants and ships them from one state to another or to a foreign country, it is acting under its war power, and that power alone. It is not engaging in commerce and its activity is not subject to regulation under the commerce power. Cf. *De Pont v. Davis, Director General*, 264 U. S. 456, in which the Court held a section of the Transportation Act of 1920 inapplicable to the Government's war time operation of the railroads, stating (at p. 462):

"In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain,' \* \* \* and it may not be held to have waived any sovereign right or privilege unless plainly so provided. \* \* \*

Both the war power and the commerce power may be used to regulate the activities of others. Congress may use them simultaneously. But the war power is more than a regulatory power. It is the power to use armed forces and to direct their operations. It is the power to equip and maintain such forces and to ship to them whatever may be necessary. It is inconceivable that the constitution was framed so as to result in a head-on collision between the war power and the commerce power. Yet, if Petitioners are correct and the Fair Labor Standards Act is applicable here, such a collision occurred every time the

Government shipped ammunition which was not produced in accordance with the standards of the Act.<sup>24</sup>

As was said by Judge Sibley below, 164 F. (2d) 1016; at p. 1019, if the power to regulate commerce had been retained by the states, no one would suggest that the Federal Government's war power would in any way be circumscribed by the states' regulation of commerce. The soundness of Judge Sibley's analysis finds strong support in the New York Court of Appeals' decision in *Public Service Commission v. New York Cent. R. Co.*, 230 N. Y. 149, 129 N. E. 455 (1920), where the court made clear that the State's power over commerce was suspended when the Federal Government exercised the war power.

The shipment by the Government of finished ammunition—although an exercise by the sovereign of its war power—could, admittedly, be subjected by Congress to such regulations as it thought proper. But this cannot help the Petitioners, for they are relying on a Commerce Clause statute, whereas any Congressional regulation of Governmental war activities must be, in itself, an exercise of the war power. Cf. *Krausz v. United States*, 14 F. Supp. 291 (Ct. of Cl., 1936), holding that property in the hands of the Alien Property Custodian was not subject to federal tax statutes except as Congress may give its consent in the exercise of the war power. No such enactment is found here. Had Congress intended these wartime shipments to be subject to the Fair Labor Standards Act, a statute already two years old at the time the war production problem arose, it would most certainly have taken action under the war power to provide the actual shippers of the ammunition with such protection from proceedings under the "hot goods" section of the Act (Sec. 15 (a) (1)) as would enable them to ship ammuni-

<sup>24</sup>Various defenses would, of course, be open to the individuals who shipped the ammunition, such as the claim that they were not "persons" or that the ammunition was not "goods." But the existence of such defenses is wholly accidental and does not resolve the basic conflict referred to here.



tion when and where it was needed, irrespective of whether overtime compensation had been paid during the production process.

Upon the basis of the foregoing analysis of the commerce and war powers of the Federal Government it is submitted that courts have been correct in holding that there was no production of goods for "commerce" at Government-owned war plants such as the one involved here. Since the Fair Labor Standards Act was clearly an exercise of the commerce power alone, its application to production for interstate shipment necessarily depends upon the interstate shipment constituting commerce in the constitutional sense. Where, as in this type of case, the interstate shipment is not commerce in the constitutional sense but an activity of the Government itself carried on pursuant to the war power, the Act does not apply. The decision below that Petitioners were not producing goods for "commerce" should be affirmed.

### CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Court below should be affirmed.

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## APPENDIX

12-1-43 (11-1-43) Ordnance Procurement Instructions 50,001

## Part 50—Administration of Cost-Plus-a-Fixed-Fee Contracts

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## Section A—GENERAL

50,000. Scope of this Part. This Part deals with general matters concerning the administration of cost-plus-a-fixed-fee contracts. Particular matters are dealt with in other parts of Ordnance Procurement Instructions, such as taxes, labor, insurance, fiscal procedure, auditing, property accountability, plant security, etc.

## 50,001: Definitions.

50,001.1. New Ordnance Facility.—The term "New Ordnance Facility" means a Government-owned, contractor-operated plant under the jurisdiction of the Ordnance Department. Where the term "New Ordnance Facility" appears in Ordnance Procurement Instructions, except where authority to make awards of contracts is concerned, it shall be deemed to include contractor-operated Field Service depots.

50,001.2. Contracting officer's representative.—As used in this Part 50, the term "contracting officer's representative" means the person designated by the contracting officer to exer-

cise primary authority with respect to administration of a particular contract.

\* \* \*

#### 50,002. Duties of Commanding Officers and Contracting Officer's Representative.

50,002.1. In the case of new Ordnance facilities and contractor-operated Field Service depots, the contracting officer's representative appointed by the contracting officer administering the operating contract will also be appointed the commanding officer of the station. Since the station is a "Class IV installation under AR 170-10 as amended, he will be guided by the provisions of pertinent Army Regulations. In general, Army Regulations pertaining to the duties and responsibilities of a commanding officer do not apply in the full sense as the term is used in connection with regular posts, camps, or stations, in that such duties and responsibilities are affected by the terms of the contract entered into by the Government and the company operating the plant, works or depot. The Contracting Officer for each such new Ordnance facility or Field Service depot is in most cases the chief of the respective matériel branch of the Industrial Division, Office of the Chief of Ordnance or the Chief of the Storage Branch, Field Service Division. The job of Commanding Officer, although secondary to the more important job of contracting officer's representative, is necessary since the plant or depot and equipment are owned by the Government and require the supervision of a Commanding Officer as representative of the War Department in carrying out certain duties, among others:

a. Safety and defense of the station (including Military Intelligence and Sanitation).

b. Welfare, discipline, training, conduct, bearing, and appearance of military personnel.

c. Preservation, proper application and use of public property.

d. Enforcement of laws and regulations including the exercise of Court Martial Jurisdiction in accordance with the Articles of War.

e. Correction of irregularities and extravagance he may discover, or which may be reported by him.

f. Protection of the public interest in all matters relating to the administration of the contract and operation of the plant, works, or depot.

g. Preservation and promotion of harmonious relations with civilians.

h. Determination that Government personnel required to be bonded are bonded before entering on duty involving accountability.

i. Certification of Government pay rolls, vouchers, and purchase orders.

j. Assignment of military and civilian staff to specific duties and establishing their authority.

k. Accountability and responsibility for public property.

l. Necessary investigations and submissions of required reports to various divisions of the Ordnance Department, to the Service Commands and elsewhere.

m. Receiving and cooperating with all official visitors.

50,002.2 With respect to item k above, regarding property accountability and responsibility, a contracting officer's representative does not have responsibility in the sense of pecuniary liability for Government property in the possession of the contractor. Although failure on his part to carry out the duties imposed upon him as contracting officer's representative in connection with Government property in possession of the contractor will not subject him to financial liability for the property involved, he may, in appropriate cases, be subject to disciplinary action for dereliction of duty.



50,002.3 There are several types of contracts for the building and operation of Ordnance plants works and depots. They are, generally, of the cost-plus-a-fixed-fee type which specifically defines the obligations, responsibilities, rights and interests of the contractor, the Contracting Officer, and the contracting officer's representative. The term "contracting officer's representative", when used hereinafter in OPI 50,002. 4-50,002.12, inclusive, shall be construed to include the term "Commanding Officer."

50,002.4 The contracting officer's representative is appointed by the Contracting Officer to perform certain functions which in general are outlined in a particular contract. Certain duties and responsibilities, however, remain with the Contracting Officer. The primary interest of the contracting officer's representative is to be present and give his personal attention to the administrative problems which arise during operation of the contract so as to protect the interests of the Government under any and all circumstances. He must interpret the contract and directives pertaining thereto, and must maintain close liaison with the contractor. A contracting officer's representative is charged with the responsibility of performance, where applicable, or supervision of performance, in connection with the following functions in order to insure that the interest of the Government is being adequately protected: (a) protection of the plant or depot and of other Government property; (b) preservation and proper use of property, including maintenance of proper records; (c) production or operations at the plant, works, or depot, as the case may be; (d) industrial relations; (e) process inspection; (f) purchases; (g) accounting; (h) repair and maintenance; (i) plant improvements; (j) co-operation with City, County, State, and other Government officials, and representatives of other organizations on matters pertaining to the plant, works or depot; (k) management of Government staff, which includes inspectors, auditors, etc.; (l) findings of fact, certifications, and approvals pertaining to

the administration of the contract; (m) investigations and correction of any irregularities which he may discover or which are brought to his attention; (n) submission of required reports to various divisions of Ordnance Office; (o) safety and sanitation; and (p) performance of duties of Inspector of Ordnance (see OPI 50,003.).

50,002.5 With regard to the duty of protecting the Government plant, depot, and other Government property, it is to be observed that the relationship between the contracting officer's representative and the plant guards is an unusual one. Plant guards as Auxiliary Military Police are at all times under the command of the contracting officer's representative and subject to orders and regulations issued by military authority, and are also subject to military law and court martial jurisdiction in appropriate cases. They may not resign without the written approval of the contracting officer's representative. Nevertheless, their militarization does not change the basic attributes of the relationship between them and the contractor as their employer. Guards are permitted to organize and join labor organizations and to bargain collectively, but no activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police (see OPI 9,104.3A and OPI 57,004.3.).

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## PART 57—PLANT SECURITY

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## Section B—COST-PLUS-A-FIXED-FEE CONTRACTS

57,100. Plant protection in cost-plus-a-fixed-fee contracts.

57,100.1. Primary responsibility.—The protection of Government-owned plants operated by contract under the supervision of Chief of Ordnance is the primary responsibility of the contractor-operator and the commanding officer.

57,100.2. State and local governments.—State and local governments will enforce State laws and local ordinances and in general provide normal police, fire, health, and safety protection outside the boundaries of the military reservation. Although the primary responsibility for the enforcement of police regulations outside the military reservation boundaries rest with the State and local governments, the commanding officer or the contractor may assist the local government where this is necessary.

57,100.3. Commanding officer's responsibility.—Government-owned contractor-operated plants are military reservations. Commanding officers appointed by War Department orders are responsible for the safety of all personnel and Government property. The following is an extract from AR 210-10:

4. \*\*\* b. He will be responsible for

(1) The safety and defense of the post. \*\*\*

(4) The reservation, proper application, and use of public property.

(5) The strict enforcement of laws and regulations. \*\*\*

(9) The guarding of the public interests in every particular.

It is, therefore, important that all commanding officers issue regulations that will insure the maximum protection to all personnel and to Government property in any event. These general regulations should be cooperatively issued by the contractor

and the commanding officer. The commercial safety experience is ordinarily with the contractor and the military responsibility is in the commanding officer. The enforcement of these rules is discussed in OPI 57,003.

57,100.4. Commanding officer's duties.—The responsibility of the commanding officer includes, but is not limited to, the following:

a. To see that the security and safety provisions of the contract and all regulations issued by the Office of the Chief of Ordnance or the War Department, or recommendations by the Safety and Security Branch or the Service Commanders, are fulfilled by the contractor. Ordinarily the commanding officer will not interfere with the administration of the safety and security plans of the contractor, unless a serious condition or emergency arises requiring the immediate intervention of the commanding officer for the protection of his primary responsibility to the Chief of Ordnance.

b. To report at once to the Chief of Ordnance all instances wherein the contractor fails to provide the necessary protection.

c. To prepare and keep up to date plans, in accordance with War Department directives, which will provide adequate security of the plant in case of insurrection, riot or other emergencies.

57,100.5 Commanding officer's staff.—It is recommended that during the operation of the plant the staff of the commanding officer include an Intelligence Officer, a Safety Officer, a Plant Protection Officer, and an Officer of the Day.

57,101. Operator-contractor's responsibility.—It is the responsibility of the operator-contractor to — —

a. Provide necessary equipment for the prevention of unauthorized entry to the plant.

b. Provide an adequate guard force to be administered in accordance with directives to be issued.



c. Provide adequate fire protection equipment under the direction of a Fire Chief employed by the contractor.

d. Provide, train and administer adequate fire protection organizations.

e. Provide safe and healthful working conditions for employees.

57,101.1 The War Department pamphlet entitled "Plant Protection for Manufacturers" was written "to provide manufacturers with a statement of what the War Department expects in the way of plant protection at all properties producing important, critical and essential supplies for war use."

The pamphlet is the authoritative reference for plant protection. Copies can be secured from the Washington Liaison Office, Safety and Security Branch, Office of the Chief of Ordnance. The contractor shall install and maintain in and about his plant additional equipment and personnel as required by the contracting officer. The contracting officer will implement the recommendations of the appropriate War Department personnel.

57,102. Protective features.—The adequate protection of a Government-owned privately operated plant ordinarily embraces the following:

a. Proper fencing around each manufacturing and explosive storage area.

b. Patrol roads located inside the fenced areas.

c. Patrol cars equipped with two-way radios and operating on patrol roads or mounted patrols, foot patrols, or dog patrols, or other effective means of patrolling the establishment.

d. Flood lighting systems located within fenced areas and illuminating grounds immediately surrounding all buildings.

e. Sentry boxes equipped with telephones and located at suitable intervals within the fenced areas.

f. Alarm systems particularly for fire and air raids.

g. Adequate fire fighting equipment.

## SECTION C—JURISDICTION AND MILITARY RESERVATIONS

57,200. Jurisdiction.—Under this section are discussed problems arising out of the fact that certain Ordnance facilities are of such size as to create problems of safety and security which are of a governmental rather than commercial nature. The most important single factor in determining the responsibility of the Ordnance Department for safety and security problems of a police nature is the determination of jurisdiction.

57,200.1 Military reservations.—The term "Military Reservation" has no particular legal significance. It is a phrase used by the War Department to describe real estate devoted to War Department uses. No police powers or responsibilities arise merely because a particular place has been designated a Military Reservation.

57,200.2 Military areas.—Executive Order 9066, dated February 19, 1942, recites that "Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense materials, national defense premises, and national defense utilities," the President as Commander-in-Chief of the Army and Navy authorizes and directs "The Secretary of War and the military commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, to prescribe military areas in such

places and of such extent as he or the appropriate military commander may determine, from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion." The order also authorizes the Secretary of War and the military commanders "to provide for residents of any such areas who are excluded therefrom such transportation, feed, shelter, and other accommodations as may be necessary" and "to take such other steps as he or the appropriate military commander may deem advisable to enforce compliance with the restrictions applicable to each military area \* \* \*"

57,200.3. Exclusive jurisdiction.—Exclusive jurisdiction may be acquired by the United States either by purchase of land with the consent of the Legislature of the State wherein the land comprising a military reservation lies, under the provisions of article 1, section 8, clause 17, of the Federal Constitution, or by direct cession by the State of such jurisdiction to the United States. Prior to February 1, 1940, it was legally presumed that the United States had accepted jurisdiction where offered. However, in either case, the express acceptance of jurisdiction by the United States is presently required by Federal law. Where the United States acquires exclusive jurisdiction, complete sovereignty is vested in the Federal Government and control by the State is terminated. In such cases there continues in effect, until abrogated, those rules, existing at the time the State surrenders jurisdiction, which govern the rights of the occupants of the territory transferred. Statutes enacted after the surrender of jurisdiction, however, are not a part of the body of laws in the ceded area. The criminal laws of the United States are in effect in areas where the United States has exclusive jurisdiction. Where there is no Federal criminal law applicable to a particular matter, the present laws of the State, applicable and in force on February 1, 1940, are

effective and a violation thereof will be deemed a violation of a like Federal offense and subject to a like punishment.

57,200.6. Service of process.—The reservation of the right to serve process is not considered by the courts a limitation on exclusive jurisdiction. However, on military reservations under the exclusive jurisdiction of the United States, reasonable regulations may be made by the commanding officer on the subject of service of process so that access to the property will not endanger either the process servers or the plant itself.

57,200.7. Jurisdictional status of Ordnance establishments.—The Office of the Chief of Engineers reports that the Federal Government has attained exclusive jurisdiction in certain establishments over which the Chief of Ordnance has retained responsibility in plant protection matters. The following list will be amended from time to time as jurisdiction is obtained at additional plants. Inquiry as to the present jurisdictional status of establishments not listed hereafter may be addressed to Safety and Security Branch, Washington Liaison Office, Attention of Legal Unit, Office of the Chief of Ordnance, Washington, D. C.

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57,201. Rules and regulations for military reservations.—Rules and regulations, promulgated by commanding officers for the safety and security of military reservations under their charge and the protection of the public interests therein, do not have the force and effect of a law, the violation of which would constitute a criminal offense. There is no present general statutory authority permitting the commanding officer of a



military reservation to prescribe rules, enforceable with criminal penalties, applicable to persons not subject to military law. If the rules and regulations so promulgated by the commanding officer are, however, substantially similar to either an existing penal law of the State in which the military reservation is located, violators thereof may be subject to criminal penalties in either the State or Federal courts, as the case may be. The commanding officer of a military reservation may always eject from the reservation violators of regulations promulgated by him, and can order such violators not to reenter the reservation. Re-entry thereafter would be punishable under the Federal Criminal Code.

57,201.1. Disciplinary enforcement of regulations at military reservations over which the United States has exclusive jurisdiction.—The commanding officer is responsible for the maintenance of law and order at military reservations under the exclusive jurisdiction of the United States. The contractor-operator is primarily responsible for the safety and security of the plant located on such military reservation, but is under no legal obligation to exercise police powers beyond the duties of any private citizen. The commanding officer may eject from the military reservation violators of regulations promulgated by him, and order such violators not to reenter the reservation. If an offense (which is prescribed by a Federal Criminal Statute) is committed on a military reservation, the commanding officer may cause the offender to be arrested and turned over, as soon as possible, to the United States marshal. Similarly, where an offense is committed on a military reservation, under the exclusive jurisdiction of the United States, which is made penal by the laws of the State in which the military reservation is located, in effect prior to February 1, 1940, and still in effect, the commanding officer may cause the violator to be arrested and turned over to the United States marshal as soon as possible.

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Supreme Court of the United States

OCTOBER TERM, 1947

NO. 590

HARRIS KENNEDY, ET AL.

PETITIONERS.

VERSUS

SILAS MASON COMPANY

RESPONDENT

ON WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE

JUNE P. WOOTEN

*Amicus Curiae*

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## BRIEF AMICUS CURIAE

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### Petitioners were Employees of Respondent

Respondent contends that the petitioners were not employees of the contractor but were employees of the Government. It asserts that according to the common law conception of master and servant with its independent contractor exception the relationship of employer-employee did not exist between respondent and the petitioners, because some degree of control and supervision was exercised by the Government. Petitioners believe the degree of control and supervision reserved and exercised by the Government in the execution of the contract was not sufficient and extensive



enough to make the respondent a mere agent of the Government. The Fair Labor Standards Act contains broad definitions of "employer," "employee" and "employ." The contract between the Government and the appellee specifically provided that the petitioners should be considered employees of appellee. (Art. IV-A. 7 45). Although it is realized that the mere statement in the contract is not determinative of the true relationship, yet the additional requirements of the contract which were observed by the contracting parties providing that respondent should employ petitioners and others who were to work at the Louisiana Ordnance Plant, pay them, exercise control and supervision over them in their employment, withhold their income tax and report same, make payments of employment security taxes, social security taxes and do everything usually done by employers, bring petitioners within the employee relationship with respondent. At no time were the employees advised nor was it ever suggested by anyone prior to the institution of this suit that they were not employees of respondent, but were employees of the Government.

In **Rutherford Food Corporation v. McComb**, 329 U. S. 23, 67 S. Ct. 1473, it was said

"This Act (referring to the Fair Labor Standards Act) contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category."

Reference was made to **Walling v. Portland Terminal Company**, 330 U. S. 148, 67 S. Ct. 639; **United States v. Rosenwasser**, 323 U. S. 360; 65 S. Ct. 295, 89 L. Ed. 301. **Williams v. Jacksonville Terminal Co.**, 315 U. S. 386; 62 S. Ct. 659; 86 L. Ed. 914. The doctrine is well established by the above decisions that the coverage of the Act is not limited to the master-servant relationship, but is more extensive and depends upon

the history, terms and purposes of the legislation, takes its color from its surroundings, and must be read in the light of the mischief to be corrected and the end to be obtained. **NLRB v. Hearst Publications**, 322 U. S. 111; 64 S. Ct. 851.

To deny to employees of contractors operating under a cost-plus-a-fixed-fee contract with the Government the protection, rights, benefits and privileges of the Fair Labor Standards Act would be to eliminate many million workers from its benefits. There can be no distinction in law or reason why employees doing the same kind of labor upon the same type of materials which are to be devoted to the same purpose, should not be covered by the Act when they work for DuPont and be excluded from the Act when they work for respondent or any other Governmental contractor on a cost-plus-a-fixed-fee contract.

Inasmuch as the Fair Labor Standards Act is a part of the social legislation of the 1930's and is of the same general character as the National Labor Relations Act and Social Security Act, decisions interpreting the latter two acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act. See **Rutherford Food Corporation v. McComb**, Supra. Petitioners believe that the decision of the court in the case of **NLRB v. Atkins & Company**, 331 U. S. 398, is controlling. Every point upon which the respondent relies to exclude petitioners in the instant case were present in the Atkins case.

In the Atkins case certain employees of Atkins and Company, a concern engaged in the manufacture of items necessary for the war, were militarized as auxiliary military police at the request of the War Department. The guards performed such duties as inspecting persons, packages, persons carrying cash to various parts of the plant and generally surveying the premises to detect fires, suspicious circumstances and sabotage. The guards were enrolled as civilian auxiliaries to the

military police under War/Department regulations issued pursuant to Executive Order No. 8972. The purpose of the military organization of the plant guards was to increase the authority, efficiency and responsibility of guard forces at plants important to the prosecution of the war and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations. The military authorities reserved the right to veto the hiring or firing of any plant guard where such action by the employer might impair the efficiency of guard forces. They were subject to call for military service even where emergencies arose at places other than the plants where they worked. Military plant guard officers were authorized to exercise direct control over the guard forces in matters relating to military instruction and duties as auxiliary military police after consultation with and, if possible, concurrence by the plant management. The guards were required to sign agreements with the United States wherein it was agreed that the guards would support and defend the Constitution, bearing faith and allegiance to same, and would faithfully discharge their duties as civilian auxiliary to the military police. The Articles of War were read to them and they were subject to military law during their employment. The regulations provided that the guards could be court-martialed where no other effective form of punishment would be effective.

Atkins Company recruited the personnel for the guard forces through its ordinary employment channels and it had power to initiate discharge from the forces subject to the approval of the military. The guards were at all times carried on the company's regular pay-roll and rate of compensation was determined under the same procedure as other employees and they were paid in the same manner. The company maintained its liability to the guards on matters of social security and workmen's compensation and was obliged to obey all minimum wage and maximum hour

requirements.

Most of the rights exercised by Atkins Company were identical with those exercised by respondent in its operation of the Louisiana Ordnance Plant. Respondent recruited all of the personnel, including the petitioners, through its ordinary employment channels, prescribed the duties of those employed, saw to their training, assigned them at the plant in accord with the need and requirements of the production schedule, and the qualifications of the worker, promulgated and enforced measures for the control of the employees while on the premises of the plant and the supervision of them while in the discharge of their employment, determined their wage rates and schedules in accordance with the procedures prescribed by the agencies set up during the war emergency, carried the men on their regular pay rolls, paid them by check drawn to respondent's account, withheld income tax from their wages, paid employment security benefits upon them in the name of respondent, made provisions for workmen's compensation insurance, initiated their discharge and actually effected the discharge. The only right reserved by the Government concerning the discharge of employees was in the event the Government determined that an individual employee should be discharged because he was incompetent or dangerous to the security of the United States.

In the Atkins case the Court reasoned:

"In this setting, it matters not that respondent was deprived of some of the usual powers of an employer such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their services. Those are relevant but not exclusive indicia of an employee-employer relationship under this statute. As we have seen, judgment as to the existence of such a relationship for the purpose of this Act must be made with more than the



common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present."

The courts have always given the greatest consideration to the view and action taken by the agency charged by law with the administration of an Act. In numerous decisions this court has said that the interpretation of the administrator of the Wage and Hour Act should be given great weight. The responsibilities of the Administrator of an Act, such as the Fair Labor Standards Act or the National Labor Relations Act, and determinations of the Administrator of the complex situations confronting him in the performance of his duties, are the reason for the policy announced above. In the *Atkins* case this principle found expression of the court in the following language: 7

"The board's determination that there was a relationship in this case deserving of statutory protection does not reflect an isolated or careless reconciliation of the rights guaranteed by the Act with the important wartime duties of plant protection employees. In the course of its administration of the Act during the war, the board was faced with this problem many times. It was well acquainted with the important and complex considerations inherent in the situation. The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the board. In the absence of some compelling

evidence that the board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the board and to substitute their own ideas of the public interest."

In the case now before the court, the Wage and Hour Division of the Department of Labor filed a brief with the trial court and with the Fifth Circuit Court of Appeals and will probably file a brief ~~as~~ *amicus curiae* in this court. The official position taken by the Wage and Hour Division is that the petitioners are within the provisions of the Fair Labor Standards Act.

To determine whether petitioners were employees of respondent or (as the lower Court held) employees of the Government, the language of the contract between respondent and the Government should be taken into consideration.

The opinion of the Circuit Court of Appeals states: "The appellants were working directly under the supervision and control of the Government." (R. 251) Neither the terms of the contract nor the facts of actual employment sustain such a holding. The contract sets out that appellants were to work directly under the supervision and control of the respondent, an independent contractor.

Reference is made to the following excerpts from the contract:

Art. VII-A. " . . . . other representatives of the contractor having supervision or direction of the operation of the plant . . . . " (R. 70,71)

Art. III-A. " . . . . The contractor shall hire or select the key personnel necessary for the operation of the plant . . . . shall proceed to train such personnel in the duties and functions of their respective positions . . . . " (R. 41,42)

Art. IV-A. 1. "..... the contractor shall undertake all preparations necessary for the subsequent operation of the plant, including necessary training of personnel for such operation in addition to the key personnel trained pursuant to Title III hereof, and all other services incident to setting up an efficient and going operating force." (R. 43,44)

Art. IV-A. 7. "..... contractor is authorized and shall do all things necessary or convenient in the operating and closing down of the plant .... including .... the employment of all persons engaged in the work hereunder (who shall be subject to the control and constitute employees of the contractor) ... " (R. 45)

Art. IV- D. b. "All persons employed by the contractor in the manufacture or furnishing of all materials ..... used in the performance of the contract will be paid .... not less than the minimum wages as determined by the Secretary of Labor ..... " (R. 48)

Art. IV-D. c. "No person employed by the contractor in the manufacture ... of the materials ..... articles ..... used in the performance of the contract shall be permitted to work in excess of eight hours in any one day .... " (R. 48)

Art. V-A. 1 "Contractor shall be reimbursed ..... for ..... expenditures in the performance of the work under this contract for (a) all labor ..... including the training of operating personnel." (R. 61) d. "Transportation and training expenses of ..... the necessary field forces ..... for the prosecution of the work .... of such other employees of the contractor whose full time is devoted to the work under this contract as is actually incurred in connection with such work .... " (R. 52) f. Salaries of employees of the contractor engaged directly on the work .... whether at the plant or employed full time at the contractor's offices .... " (R. 52)

Art. VII-A. "..... Government shall hold con-

tractor harmless against any loss . . . . or damage . . . . . except . . . . . that such loss . . . . . damage . . . . is due to the personal failure on the part of the corporate officers of the contractor, or other representatives of the contractor having supervision or direction of the operation of the plant . . . . ." (R. 70,71)

The only semblance of control which the Government retained over the workmen was in the following provisions of the contract:

Art. IV-A. 4 "The work under this Title IV shall be performed in accordance with the current applicable specifications which will be furnished by the contracting officer." (R. 44)

Art. V-A d "No male person under sixteen years of age and no female under eighteen years of age and no convict will be employed by the contractor." (R. 52)

Art. VII-G 6 "The contracting officer may require the contractor to dismiss from the work any employee the contracting officer deems incompetent or whose retention is deemed to be not in the public interest, subject, however, to appeal under the provisions of Article VII-N for reinstatement of such employee." (R. 76).

If it had been the intention of the Government to consider petitioners as its employees instead of designating them employees of respondent, it would have been a simple matter to have framed the terms of the contract to read that way. The Government would then have been under no obligation to provide the employee with the various benefits called for in the contract, which benefits only a private concern was under a legal obligation to furnish. The contract not only contained provisions for such benefits, but the terms of the contract were in all things performed. (R.20)

The opinion of the lower court says: "These employees were put in the munitions factories by gov-



ernment command on the theory that they were an integral part of the war machine — not because they were an essential part of the interstate commerce.” (R. 253)

The Court did not cite any statutory authority for a “government command” to persons to work in a munitions factory, nor is there any. Petitioners voluntarily entered the employment of respondent as the result of individual contracts; they were controlled by respondent, and if any were discharged, it was respondent, not the Government, that dismissed them.

Petitioners were not a part of the war machine but, insofar as their willingness to work was concerned, fell in the same category as other loyal citizens. Much of the work performed in the war factories was done by housewives, who, with husbands or sons in the armed services, with a household to maintain, children to care for and send to school, took time to put in long, arduous hours at a nearby war plant. They were not induced to do so by legislative or executive command, but each was prompted by a sense of profound duty and love for his country.

### **Petitioners Produced Goods for Commerce**

The respondent maintains that the petitioners were not engaged in the production of goods for commerce. The basis of respondent's contention seems to be in a very narrow definition of the term “commerce,” seeking to give it a special limited meaning instead of the constitutional meaning that it deserves. The respondent says in effect that since munitions of war, in wartime, are not the subject of trade and traffic in a commercial sense, they cannot constitute goods and that, therefore, the transportation of them by the Government after taking title at the plant does not constitute the production of goods for commerce under the Fair Labor Standards Act. This court is firmly committed to the doctrine that interstate commerce is

the transportation of goods from one state to another state. The crossing of a state line appears to be the most determinative single factor. In a constitutional sense it is not necessary that the thing transported be goods in a commercial sense. Citations will not be repeated here, as they are set out in the admirable brief filed by petitioners. The framers of the Act in order to eliminate any controversy over the definition of interstate commerce expressly included therein the word "transportation" making the definition read, "commerce means trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof." At the time these goods were processed it was understood that they would be transported from the place of processing in Louisiana to another state. This literally brings it within the definition of the Act. Construction of the other social legislation of the same period is in accord with the above announced principle.

The court below took the position that since the goods produced at the Louisiana Ordnance Plant were munitions of war to be devoted to the prosecution of the war they could not be classified as goods under the Act and their manufacture and transportation were administrative acts of the sovereign power. With due respect to the court below, the reasoning is not consistent nor can its philosophy be extended to a logical conclusion. In the same opinion the court states:

"Had the defendant been engaged under its contract in the business of manufacturing munitions of war, either as a general proposition or under contract by which it agreed to produce and sell to the Government, either at a fixed price or at a price to be fixed from time to time, then we are of the opinion that it would come within the Fair Labor Standards Act." (R. 250)

It is impossible for the respondent to draw a dis-

inction between tanks produced by Chrysler, explosives by DuPont, rifles by Winchester, trucks by General Motors, aluminum by Aluminum Company of America and airplanes by North American, the total production being taken by the Government and the prices for same being subject to renegotiation, and munitions produced at the Louisiana Ordnance Plant. There has been advanced no good reason why the employees of the Louisiana Ordnance Plant should be excluded from the protection of the Act when the employees of Winchester, Chrysler, DuPont, etc., are covered.

The philosophy of the opinion that the procurement of munitions to be devoted exclusively to the prosecution of the war or the preparation for same, or training during and after hostilities, is an administrative act of the Government, would destroy the Fair Labor Standards Act during wartime if it were carried to its logical conclusion. If the act of procurement of munitions produced at the Louisiana Ordnance Plant is an administrative act of the Sovereign, then the procurement of tanks, artillery, trucks, airplanes and the other items necessary to the prosecution of a war would be administrative acts of the Government. Inasmuch as the Fair Labor Standards Act was passed by Congress when the war clouds were gathering, and in view of the oft repeated attempts to suspend its application to industries engaged in the production of war goods, the rejection of such attempts by Congress would appear to be conclusive.

The Administrator of the Fair Labor Standards Act, who is charged with the responsibility of administering it and has the duty of carrying out the wishes of Congress so far as they may be expressed or implied in the Act, took all of those matters into consideration. The war clouds are gathering again. Prophecies of the impending doom of civilization by an atomic war are sounded. Certainly the great mass of men and women who manned the war factories in the last war,

and who will be expected to man them in the next, should not be discriminated against because they were employed by a contractor operating on a cost-plus-a-fixed-fee basis. Discrimination against part of the workers of this country solely because of the type of contract under which their employer is producing goods, is entirely out of harmony with the purposes of the Fair Labor Standards Act.

Respectfully submitted,

JUNE P. WOOTEN

*Amicus Curiae*





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# SUPREME COURT OF THE UNITED STATES

No. 590.—OCTOBER TERM, 1947.

Harris Kennedy, et al.,	} On Writ of Certiorari to the
Petitioners,	
v.	
Silas Mason Company.	} United States Circuit Court of Appeals for the Fifth Circuit.

[May 17, 1948.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case involves questions as to the application of the overtime provisions of the Fair Labor Standards Act<sup>1</sup> to certain persons who worked in a government-owned plant in which respondent produced munitions under a cost-plus-fixed-fee contract with the War Department. It involves such subsidiary issues as whether the plaintiffs were employees of the Government or of the private contractor, whether munitions produced for shipment across state lines in war use are produced for "commerce"<sup>2</sup> and whether they are "goods"<sup>3</sup> within the meaning of the Act. Substantial claims of petitioners may be denied or large sums added to the cost of the war by the answers to these questions, and many cases other than this will be controlled by its decision.

<sup>1</sup> Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. § 301.

<sup>2</sup> The Act defines commerce as follows: "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

<sup>3</sup> The Act defines goods as follows: "Goods" means goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

The manner in which the case has thus far developed raises the question whether as a matter of good judicial administration this Court should attempt to decide these far-reaching issues on this record.

No one questions that, taking its allegations at their face value, the complaint in this case states a cause of action under the Fair Labor Standards Act. Summary judgment has gone against the plaintiffs because, by affidavit and exhibits, the allegations have been found unsustainable. The defendant filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure<sup>4</sup> "on the ground that the defendant is entitled to judgment as a matter of law." The motion, so far as the Fair Labor Standards Act was concerned, was based on an affidavit "which states facts showing that as a matter of law neither complainants nor defendant were covered" by the Act in that neither "were engaged in commerce or in the production of goods for commerce." Made part of the affidavit by reference were defendant's construction and operation contract with the Government and some 22 supplements or change orders covering nearly 200 pages of the record. The complainants then filed a supplemental complaint which added by reference all regulations and interpretative bulletins of the Department of Labor and Administrator of the Fair Labor Standards Act clarifying and explaining it. And, as against defendant's affidavit and exhibits, the plaintiffs, as recited in the District Court's opinion, offered by reference affidavits of three former employees of the contractor showing the customs of payment and operation as bearing on the issue of whether they were government

<sup>4</sup> Rule 56 provides that the trial court may award summary judgment after motion, notice and hearing, provided the pleadings, depositions, admissions and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

employees or those of the private contractor. The affidavits do not appear in the record, but parts deemed relevant are set out in the court's opinion.

On this basis the District Court first denied summary judgment. 68 F. Supp. 576. It was of the view that the plaintiffs, whatever the forms of the transaction, were in reality employed by the Government and, hence, the Fair Labor Standards Act by its own terms did not cover them. But it held that they were covered by § 4 (b) of the Act of July 2, 1940,<sup>5</sup> and were entitled to recover overtime under it.

On rehearing, the court concluded, however, that no remedy under this latter Act was available to them in this action as it was not pleaded. Accordingly, it granted summary judgment against them. 70 F. Supp. 929. The Circuit Court of Appeals, Fifth Circuit, sitting *en banc* affirmed. 164 F. 2d 1016. It held that the plaintiffs were in substance employees of the United States, that munitions were not a part of commerce within the meaning of the Act, and that in any event munitions were not "goods" within the meaning of the Act. One judge, concurring, did not pass on the question whether petitioners were employees of the Government but held only that munitions were produced for war, not for commerce. One judge dissented on the ground that the whole system "was designed and operated so that the United States should not be the employer" and considered that munitions produced for transportation to a place outside of the State were produced for commerce and those engaged therein were subject to the Act. The case is here on certiorari, 333 U. S. —.

The Silas Mason Company, in a sense, is no more than a nominal defendant, for it is entitled to reimbursement from the Government. The Government, the ultimate

<sup>5</sup> Act of July 2, 1940, c. 508, 54 Stat. 712.



*statutory basis for the*

party in interest, appears through the Department of Justice in support of the claims against itself. But it advises us that "The Department of the Army is of the view that respondent's position has merit for the reasons set forth in the brief filed by respondent. The Army is concerned with the great cost to which the Government will be subjected if the numerous suits akin to this are lost, or even if it must bear the cost of defending them. Furthermore, the Army believes that the classes of employees involved in these cases were well paid, that they accepted their compensation without complaint or expectation of receiving more until this litigation was commenced sometime after the termination of their employment, and that accordingly there is little equity in the employees' present position."

Three Acts of Congress require consideration. The plaintiffs and the Government say the Fair Labor Standards Act is controlling. The defendant, the Department of the Army, which handled the transaction, and the District Court consider that the Act of July 2, 1940, controls the liability. But the trial court held it cannot be the basis of adjudication of plaintiffs' claims because no such issue was pleaded and that holding has become the law of the case since there has been no appeal. The plaintiffs pleaded their cause of action also under the Walsh-Healey Public Contracts Act,<sup>6</sup> but it was held unavailable to them below and their petition for certiorari to this Court raises no question as to that Act and acquiesces in dropping it from our consideration.

On the question as to who was the employer, on which this case was decided below, the complaint makes a clear, factual and simple allegation. It says that these plaintiffs were employed by the corporate defendant itself. This allegation has been overborne by interpreting the

<sup>6</sup> Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. § 35.

terms of the contracts between that alleged employer and a third party, that is, the Government, which terms may or may not have been known to the employees. There is substantial controversy as to the way these two parties, the Government and defendant in actual practice, construed their contracts, both sides of the controversy being based on events of which we are asked to take judicial notice or to spell out from contracts without the tests which trial affords. The plaintiffs in turn seek to counteract whatever inferences may be drawn from the defendant's version of dealings between defendant and the Government by contrary inferences from dealings between employees and the defendant. But they do not prove plaintiffs' own dealings, which are not in the record, but offer affidavits which relate specifically to "laborers and mechanics", while plaintiffs were inspectors and foremen, a difference that may be material. Insofar as the allegations of the complaint are impeached by the course of dealing between defendant and the Government, they are not supported by any course of dealing to which these plaintiffs were parties. What they were paid and on what basis, whether they have already been paid for overtime on the theory that one of the other Acts applies, we do not know.

Defendant's present position, which, for all we know, may or may not be shared by the Department of the Army, is that we do not need to settle the question as to whether defendant or the Government was the actual employer, that the effect of the war-time legislation was to set up a wholly new system of war production, which was neither private enterprise nor government operation, but an amalgamation of the two, which also prescribed a complete system of labor relation by statute which supercedes and precludes operation of the Fair Labor Standards Act. But this broad contention seems not to have been submitted to either court below, is not con-

sistent with the theoretical basis of their decisions and appears fully presented for the first time in the reply brief in this Court.

The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation. The case, which counsel have described as a constantly expanding one, comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties, and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in

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Rule 56 requires that summary judgment shall be rendered "if there is no genuine issue as to any material fact. . . ." See note 4:

this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Without intimating any conclusion on the merits, we vacate the judgments below and remand the case to the District Court for reconsideration and amplification of the record in the light of this opinion and of present contentions.

*Judgments vacated.*

MR. JUSTICE BLACK thinks the judgment should be reversed.

MR. JUSTICE DOUGLAS concurs in the result.